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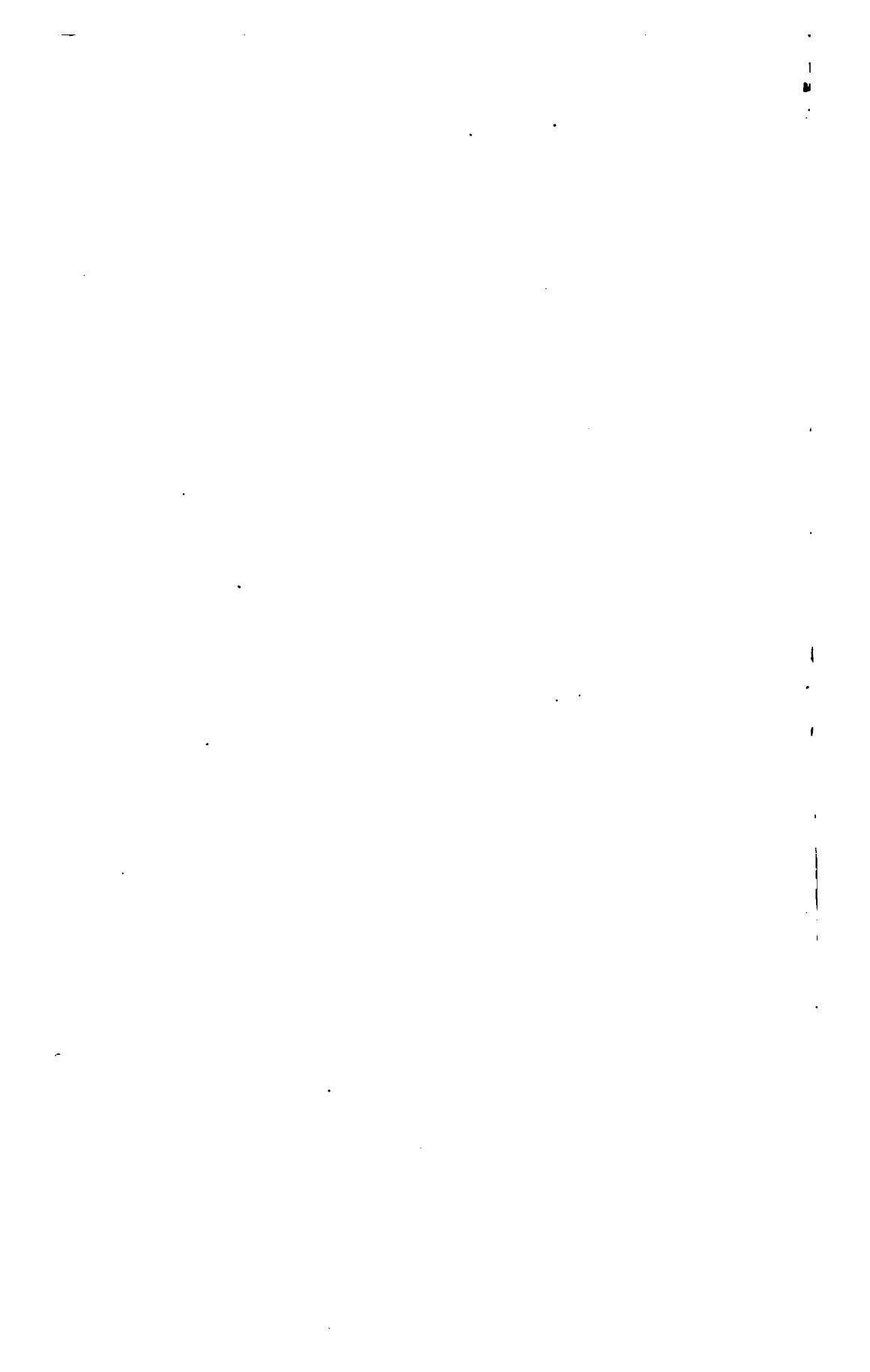
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REPORTS
OF
Cases in Law and Equity
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF NEW YORK.

BY OLIVER L. BARBOUR, LL. D.



VOL. XXXII.

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DURING THE YEAR 1860.

FIRST JUDICIAL DISTRICT.

- CLASS 1. BENJAMIN W. BONNEY.*†
" 2. THOMAS W. CLERKE.§
" 3. JOSIAH SUTHERLAND.
" 4. DANIEL P. INGRAHAM.
" 5. WILLIAM H. LEONARD.†

SECOND JUDICIAL DISTRICT.

- " 1. JOHN A. LOTT.*
" 2. JAMES EMOTT.
" 3. JOHN W. BROWN.
" 4. WILLIAM W. SCRUGHAM.†

THIRD JUDICIAL DISTRICT.

- " 1. WILLIAM B. WRIGHT.§
" 2. GEORGE GOULD.*
" 3. HENRY HOGEBOOM.
" 4. RUFUS W. PECKHAM.†

FOURTH JUDICIAL DISTRICT.

- " 1. AMAZIAH B. JAMES.*
" 2. ENOCH H. ROSEKRANS.
" 3. PLATT POTTER.
" 4. AUGUSTUS BOCKES.†

JUSTICES OF THE SUPREME COURT.

FIFTH JUDICIAL DISTRICT.

- CLASS 1. WILLIAM J. BACON. §
 " 2. WILLIAM F. ALLEN.*
 " 3. JOSEPH MULLIN.
 " 4. LE ROY MORGAN. ‡

SIXTH JUDICIAL DISTRICT.

- " 1. CHARLES MASON.*
 " 2. RANSOM BALCOM.
 " 3. WILLIAM W. CAMPBELL.
 " 4. JOHN M. PARKER. ‡

SEVENTH JUDICIAL DISTRICT.

- " 1. HENRY WELLES. §
 " 2. ERASMUS DARWIN SMITH.*
 " 3. THOMAS A. JOHNSON.
 " 4. ADDISON T. KNOX. ‡

EIGHTH JUDICIAL DISTRICT.

- " 1. BENJAMIN F. GREENE.* ¶
 " " JAMES G. HOYT.**
 " 2. RICHARD P. MARVIN.
 " 3. NOAH DAVIS, JUN.
 " 4. MARTIN GROVER. ‡

CHARLES G. MYERS, *Attorney General.*

* Presiding Justice.

† Appointed by the Governor, in January, 1860, to fill the vacancy caused by the resignation of HENRY E. DAVIES.

‡ Elected in November, 1859.

§ Sitting in the Court of Appeals.

¶ Died, July, 1860.

** Appointed by the Governor to fill vacancy caused by the death of Judge GREENE.

ERRATA.

Page 32, line 7. Strike out "or" and insert "of."

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CASES
 IN
Law and Equity
 IN THE
 SUPREME COURT
 OF THE
 STATE OF NEW YORK.



WILLIAM BRIDENBECKER, president of the Frankfort Bank,
vs. LIBERTY L. LOWELL.

39	9
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68 AD*462	

Where a bank places notes, of which it is the holder, in the hands of an indorser, to be used by him in obtaining an indemnity from the maker, it thereby consents to be bound by the indorser's acts, and to that extent constitutes him its agent; notwithstanding the indorser, in making use of the notes, acts on his own behalf, and for his own indemnity.

The cashier of a bank, as its executive officer, has authority to take such measures for the security and eventual collection of a debt as he deems proper, and to act, in reference to the collection or compromise of the same, according to the general usage, practice and course of business.

In the absence of evidence that a cashier of a bank was restricted in his authority, it will be assumed that a transmission of promissory notes held by the bank, to an indorser, to enable the latter to obtain an indemnity from the maker, was within the scope of his authority.

It is not necessary that the indorser should be constituted the agent of the bank by formal letter of attorney. It is sufficient that he is put in possession of the notes, with apparent authority in respect to them, to make him the agent of the holder.

Bridenbecker v. Lowell.

Under such circumstances, as between the maker of the notes and the bank, the latter is bound by the acts of the indorser, in respect to the notes placed in his hands, as well by reason of the authority necessarily and expressly conferred, in view of the purpose for which the notes were sent, as by reason of the apparent authority with which the agent was clothed, and upon the faith of which the maker had a right to act.

Where a bank, for the purpose of enabling an indorser of notes held by the bank, to obtain payment or security from the maker, transmitted the notes to the indorser, who thereupon made an arrangement with the maker, by which property was transferred to the indorser for the payment of the notes, and the latter were surrendered up to the maker, to be canceled; and the bank, on being informed of what had been done, accepted a part of the fruits of the arrangement, without objection, and had never repudiated the transaction, or reclaimed the notes; *it was held* that the bank had, by such subsequent acts and acquiescence, ratified the acts of the agent.

In such a case, if the principal does not intend to abide by the acts of his agent, he should dissent, and give notice within a reasonable time. If he fails to do so, an assent to, or ratification of, the acts of the agent will be presumed.

Although the conveyance of the property is made to the agent, directly, and not to the bank, yet by the transfer a trust is created, for the payment of a debt due to the bank; and the fund thus provided belongs to the bank, and may be controlled by it. But the debt is not discharged, as between the bank and the maker of the notes.

A specific fund is dedicated and set apart by the debtor, and received by the creditor, for the payment of the debt; and if, upon a sale of the property, it proves insufficient to satisfy the debt, the debtor will be personally liable for the deficiency.

Where an arrangement is made between debtor and creditor, by which the former gives a new security upon property exceeding the amount of the debt secured, in value, and receives back the evidences of his indebtedness; there being at the time a general fund, or security by mortgage upon real estate, embracing all the debts of the debtor, but insufficient to pay the whole; the effect of such an arrangement is to make the specific security the primary fund for the payment of the debt specifically secured by it, and to postpone the right of that debt to participate in the general fund, until the specific fund has been exhausted.

Where the intent of the parties to a mortgage is to provide a security for all the debts of the mortgagor, and not to secure one debt by the mortgage, and then to secure the next debt incurred upon the residue of the mortgage, but rather that all shall stand as if contracted at the same time, the debts must share ratably in the fund realized from the security; without regard to priority of date.

Where a creditor, having several claims against his debtor, receives a portion of the entire amount in a judicial proceeding founded upon them all, as upon

Bridenbecker v. Lowell.

the foreclosure of a mortgage given to secure all the debts, the law will apply such money as a payment ratably upon all the claims. The creditor has no right to apply it to the satisfaction of some of the demands—especially to the payment of a debt for the payment of which a specific fund has been provided—to the entire exclusion of others.

Where money is received by a bank upon the foreclosure of a mortgage given to secure to the bank the payment of all paper then held, or thereafter to be held, by it, upon which the mortgagor should be liable as maker, indorser or acceptor, the cashier has no right, without authority from the directors of the bank, or the knowledge or assent of the mortgagor or his indorsers, to appropriate such money, or any part thereof, to the payment of notes of the mortgagor, indorsed by such cashier, to the exclusion of other notes of the mortgagor, held by the bank.

In such a case, the indorsers of other notes of the mortgagor, held by the bank, have a right, legal as well as equitable, to share ratably in the fund and security provided generally for the debts due the bank; and this right cannot be affected, or impaired, by any act of the bank or its officers.

The fact that money received by a cashier, as such, upon a sale of mortgaged premises, for a debt due the bank, has been kept by him nominally separate from the funds of the bank, and that it stands to his individual credit on the books of the bank, will not authorize him to appropriate the same to the payment of a portion of the debts secured by the mortgage, to the exclusion of the rest.

The agents of a bank, occupying a confidential relation towards it, cannot act as such in matters in which they have a personal interest

Where the cashier of a bank has been employed by an indorser of paper held by the bank, to look after his interests and see that he shares equally in a security provided for the benefit of all occupying a similar position, and he has undertaken to act in that capacity, it will be a fraud upon his principal if he appropriates the funds in such a manner as to exclude him.

Where a fund, thus raised, is in the possession of a bank, if the law does not appropriate it to the payment of the several debts due the bank, ratably, the debtor not having appropriated it, the creditor, alone, can make the application.

In such a case it is the right of the creditor to make the application of a payment in such manner as he pleases; provided he makes the election within a reasonable time, and the application made is not inequitable

But it is inequitable, in respect to the debtor, as well as to other sureties, for the creditor to apply the fund in hand to a debt for the payment of which a specific fund has been provided.

If a person authorizes another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority; and he may bind his principal, within the limits of the authority with which he has been apparently clothed, with respect to the subject matter. *Per ALLEN, J.*

Bridenbecker v. Lowell.

(A general agency is therefore constituted, not by the authority which the agent actually receives, from his principal, but by that which the latter allows the agent to assume. *Per* ALLEN, J.

THIS action was brought against the defendant as an indorser of a note for \$1000, made by one Gates, dated July 23d, 1855, and payable in ninety days from date. In September, 1856, the Frankfort Bank held notes of Gates indorsed by one Etheridge, to the amount of about \$2300, a like note indorsed by one Chipps for \$500, notes indorsed by Pomroy, the cashier of the bank, for about \$1000, and the note in suit. There had been paid to the bank, or to Pomroy, the cashier, from the avails of a chattel mortgage which had been given to Etheridge to secure him against his indorsements, and which had been assigned by him to the bank, \$524.50. There was also, afterwards, and after the arrangement with Etheridge hereinafter mentioned, paid to the bank or its cashier \$2220.50, the amount realized from a mortgage upon real property, given August 10th, 1855, by Gates to the bank, conditioned "to pay to the said bank all paper then held or thereafter to be held, by the said bank, upon which the said Gates should be liable as maker, indorser or acceptor." From this \$2250.50 the note indorsed by Chipps was paid, with the consent of the defendant, and, as it would seem, of all parties interested. In September, 1856, Gates having removed to Wisconsin, and Etheridge being also in that state, the cashier of the bank, at the request or suggestion of Etheridge, inclosed and sent to him by mail the notes of Gates, indorsed by him, with a statement of all the indebtedness of Gates to the bank, to enable the indorser, Etheridge, to obtain security from Gates. Etheridge commenced an action on the notes, in the courts of Wisconsin, in the name of the bank, and attached or garnished the property of Gates to answer the debt. Thereupon Gates conveyed to Etheridge certain real property in Wisconsin, absolutely, and suffered him to take some \$500 in money which was subject to the attachment, and took from him an agreement that in case he should realize more than enough,

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from the sale of the land conveyed, to pay the amount owing to the Frankfort Bank, (having reference to the debt for which Etheridge was liable as indorser,) and the expenses incurred by him in relation thereto, he would pay the surplus, if any, to said Gates. The suit was thereupon discontinued and the notes delivered to Gates. The money received by Etheridge on this arrangement, less the costs and expenses of the action, was remitted to the bank and received by it, and information was given to the bank of the arrangement, and it acquiesced in it. Afterwards, the \$2220.50 was received, and the Chipps note paid out of it, as before stated: At the same time that the Chipps note was paid, Pomroy, the cashier, paid from the \$2220.50 two notes of Gates, held by the bank and indorsed by him, for \$500 and \$300, respectively; the three notes, including interest, amounting, in the aggregate, to \$1383.45. The application of the money by the cashier to the payment of the notes indorsed by himself, to the exclusion of the others, was on his own motion, and without authority from the directors of the bank, or the knowledge or assent of Gates or the defendant. In December, 1856, Etheridge took the place of Pomroy as cashier, and on the day before he entered upon the duties of his office he and Pomroy, without the knowledge or assent of the directors of the bank, or the defendant, or Gates, applied \$657.13 of the \$2220.50 to the payment of Etheridge's liability to the bank as indorser for Gates upon the notes delivered up to be canceled; leaving \$180.12 still unappropriated, of that fund. Pomroy paid Etheridge of this \$80.56, and balanced Gates' account which was overdrawn to the amount of \$157.56.

The action was tried before a referee, and upon the trial, and at its close, the defendant claimed, in various forms, to be entitled to some benefit or allowance in discharge or reduction of his liability on account of the fund received by the bank from the real estate mortgage, and also urged various other defenses which it was claimed were established. The referee

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gave judgment for the full amount of the note and interest, and from that judgment the defendant appealed.

R. Earl, for the appellant.

F. Kernan, for the respondent.

By the Court, ALLEN, J. The defendant insists that the referee erred in holding that Etheridge was not the agent of the plaintiff for the settlement of the debt in suit with Gates in Wisconsin, and that the same was not satisfied and discharged by the arrangement then made. Had Etheridge undertaken to compromise and discharge the note in suit, it might, at least, have been plausibly argued, upon the evidence, that he was the authorized agent of the plaintiff in that behalf, with full power to treat and act in respect to it. There was some conflict of evidence upon the question whether the note in suit was, in truth, taken into consideration and provided for in the settlement which was made between Etheridge and Gates; and if it had depended entirely upon the oral evidence, the referee might well have found that this note entered into, and formed a part of, the consideration for the transfer of property then made by Gates to Etheridge. Especially might this have been so found if the plaintiff is right in his claim that the transfer to Etheridge was only by way of security, and not in discharge of Gates' former liability. The several indorsers for Gates, including the then cashier of the plaintiff, up to that time and for some time subsequent thereto, had acted in concert, with a view to the mutual benefit and protection of each other, and in contemplation of a division of the final loss. Etheridge testifies that after taking the conveyance in Wisconsin he told the defendant that the property would pay the entire indebtedness of Gates, into about \$1000, and that deficiency he and the defendant with Pomroy, would pay in equal parts, after the sale of the property and the application of the proceeds. Pomroy says that the

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defendant always wanted the moneys recovered applied pro rata on the several liabilities, and that he never dissented from that proposition: and that he only consented to the application of the moneys to the payment of the liability of Etheridge on condition that an arrangement should be made between the defendant and Etheridge satisfactory to both, and that he consulted the defendant about the payment of the Chipps note because he might be interested in the application of the funds. That the defendant was away from home a great deal of the time, and left the matter with him (Pomroy) to protect his interest, so far as he could, and see that he fared like others. A statement of all the indebtedness of Gates to the bank was sent at the time the notes surrendered were transmitted to Etheridge, and was exhibited at the time of the arrangement. But the written memorandum of the parties will control the oral evidence and the other circumstances of the case, and to arrive at the agreement of the parties all the papers executed by them at the time of the arrangement and as evidence of its terms, must be read together. The paper given by Etheridge to Gates and Phillips, (who was associated with Gates in some way, and as it would seem liable with him for the debt,) is general in its terms, and, subject to a verbal criticism, is sufficiently comprehensive to include the entire debt of Gates to the bank. By it Etheridge agrees to account for the property transferred, after the payment of the amount due and owing to the Frankfort Bank and the expenses incurred by him in relation to it. He had incurred no expenses, so far as appears, except in relation to that part of the debt for which he was liable as indorser. But this alone would not restrict and limit the general description of the debts provided for, to that one class. The paper, however, executed by Gates and Phillips at the same time and as a part of the same transaction, specified the notes which made up the amount of the indebtedness they were owing the Frankfort Bank, and to secure which they had given the deed of land, and the notes indorsed by Etheridge and surrendered

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on that occasion are the only notes referred to. These papers, making together a single written agreement of the parties, exclude from the arrangement the note in suit. The referee was therefore right in deciding that Etheridge did not undertake to act for the bank in respect to this note. The other questions relate to the effect of the dealing by Etheridge in respect to the notes indorsed by him and surrendered to Gates, upon the rights of the defendant and his liability in this action. No objection was taken, upon the trial, to the sufficiency of the answer, or to any defense, in whole or in part, legal or equitable, established by the evidence, for the reason that it was not warranted by the pleadings, and the decision of the referee is made upon the merits and not upon any technical ground that might have been obviated by an amendment. The objection, therefore, taken for the first time upon this appeal, to the answer, cannot prevail, even if it had been well taken on the trial. The referee was asked to decide that Etheridge was the agent of the bank in reference to all the notes which he had at the time of the settlement at Madison, and that those notes were canceled and given up to Gates, in consideration of the property then and there turned out by Gates, and that sufficient money remained in the bank to pay the notes in suit, if it had been properly applied. That the notes having been paid at Madison it was improper to pay them again out of the proceeds of the property in Herkimer county; and that the funds transferred on the books of the bank by Pomroy and Etheridge to pay those notes, were still in the bank applicable to pay this note. The case contains a prolix statement of facts found by the referee, but he does not definitively pass upon the agency of Etheridge as a question of fact. He merely states the circumstances, and the acts of the party in detail, and then says that he was not, and did not act, as the agent of the bank in any other way than as stated, in the narrative of the circumstances. As matter of law he decided that Etheridge was not the agent of the bank at Madison, but acted for his own indemnity as indors-

er of the notes sent to him, and that the bank had never ratified the acts of Etheridge in respect to such notes.

It is true that Etheridge did act on his own behalf and for his own indemnity, but it is no less true that the bank, by placing the notes in his hands to be used in obtaining that indemnity, consented to be bound by his acts, and to this extent constituted him its agent. The cashier of the bank, as its executive officer having charge of its whole moneyed transactions in paying and receiving debts, and discharging and transferring securities, had authority to take such measures for the security and eventual collection of the debt as he deemed proper, and to act in reference to the collection or compromise of the debt, according to the general usage, practice and course of business. (*Story on Agency*, § 114. *Minor v. Mechanics' Bank of Alexandria*, 1 *Peters*, 46. *Dunlap's Paley on Agency*, 156, n. 1.) In the absence of evidence that the cashier was restricted in his authority it will be assumed that the transmission of the notes to Etheridge for the purpose mentioned was within the scope of his authority. It was not necessary that Etheridge should be constituted the agent of the bank by formal letter of attorney. It was sufficient that he was put in possession of the notes, with apparent authority in respect to them, to make him the agent of the holder. That his interest was identical with that of the holder does not detract from his authority, but rather strengthens the apparent authority with which he was clothed. There was an implied authority deducible from the nature and circumstances of the act of the bank in sending the notes to Etheridge. By the act of the bank Etheridge was clothed with the apparent right of disposing of them, and in such case it will be assumed that the apparent authority is the real authority. (*Story on Agency*, §§ 93, 94, 228, 81.) If a person, authorizes another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority; and he may bind his principal within the limits of the authority with which

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he has been apparently clothed, with respect to the subject matter. (*Per Lord Ellenborough, Pickering v. Bush*, 15 *East*, 43. *Johnson v. Jones*, 4 *Barb.* 369.) A general agency is therefore constituted, not by the authority which the agent actually receives from his principal, but by that which the latter allows the agent to assume. But the authority of Etheridge to deal with the notes as he should think for his interest was express, and necessarily resulted from the purpose for which they were sent to him, to wit, that he might be enabled to secure himself, in whole or in part, against loss by reason of his liability to the bank. He was the only responsible party to the note, and as the bank relied upon him, and him alone, there was no good reason why he might not be permitted to make such use of the notes as should best secure his purpose.

Unless Etheridge could control the notes and coerce their payment by suit against Gates, or negotiate and deal with Gates in relation to them, the hope expressed by the cashier, in his letter transmitting them to Etheridge, that he might succeed in getting the security he had spoken of, would have been a vain hope, and the expression an idle one, and the sending of the notes would have been a farce.

As between Gates and the bank, the latter was bound by the acts of Etheridge in respect to the notes transmitted, as well by reason of the authority necessarily and expressly conferred in view of the purpose for which the notes were sent, as by reason of the apparent authority with which the agent was clothed, and upon the faith of which Gates had a right to act.

But if the authority, as originally conferred, was not, for any reason, ample to bind the bank to the extent of the dealings of the agent, the acts of the latter were ratified by the subsequent acts and acquiescence of the principal. The bank was advised of what had been done, and within a very few days, and as early as October, 1856, received a part of the fruits of the arrangement, and has never repudiated the trans-

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action, or reclaimed the notes. If it did not intend to abide by the acts of Etheridge in the premises, it should have dissented, and given notice within a reasonable time; and not having done so, an assent to, or ratification of the acts will be presumed. When the principals received a letter from their agent, in July, informing them of what he had done, and they were silent until October and then for the first time complained, they were considered to have waived any right of action they might have had. (*Cairnes v. Bleecker*, 12 John. 300. 2 Kent's Com. 316. *Benedict v. Smith*, 10 Paige, 127.) It follows that the bank must abide by the acts of Etheridge in accepting the transfer of property and surrendering the notes to Gates to be canceled.

It is true the conveyances were to Etheridge directly, and not to the bank; but by the transfer a trust was created for the payment of a debt due to the bank, and the fund provided belonged to the bank and might be controlled by it; first, as having been taken by its agent in his own name, the agent in such case taking as trustee and not in his own right; (*Torrey v. Bank of Orleans*, 9 Paige, 663;) and second, as the surety of Gates for the payment of the debt, receiving security from the principal debtor to which the creditor was entitled. (*Curtis v. Tyler*, 9 Paige, 432. *Heath v. Hand*, 1 id. 329.) A fund was then provided for the payment of the notes delivered up for the benefit and by the assent of the bank. Whatever may have been the rights of the bank as against Etheridge as the indorser of those notes, as between the bank and Gates the trust was for the benefit of the bank, and upon satisfaction of the debt from the trust fund to the trustee, the agent and trustee of the bank, the debt would be discharged quoad the bank as well as the indorser. That the trustee was personally liable for the same debt did not affect his relation to the principal debtor and the creditor, growing out of the transaction by which the trust was created. If this was not the effect of the whole transaction, as between the bank and Gates, then it must be held that by suffering Etheridge to possess

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and deal with the notes for his own benefit, and to obtain a valuable property from the maker upon and in consideration of the delivery of them to be canceled, the bank consented to, and did, discharge Gates from all liability to it, and took Etheridge as their sole debtor—a view much more fatal to the plaintiff than that before taken; for in that view there was from that time no right in the bank to look to Gates or his property for the payment of the debt, or to appropriate any fund of Gates in satisfaction of it. But the just view of the transaction and its effect is as before intimated. The debt was not discharged, as between the bank and Gates. A specific fund was dedicated and set apart by the debtor and received by the creditor for its payment, and whether the personal remedy against the debtor was suspended until the trust was closed and the entire fund applied in payment of the debt, it is not necessary to inquire. But if, upon a sale of the property, in the execution of the trust, it should prove insufficient to satisfy the debt, the debtor, Gates, would be personally liable for the deficiency. The written agreement of the parties treats the debt as still subsisting and as due and owing from Gates to the bank, and not as a debt discharged and paid by the transfer of the property to Etheridge.

The debt remaining, it constituted one of the debts secured by and entitled to share in the real estate mortgage given by Gates directly to the bank, in August, 1855, and before any of the notes in evidence were made. At the time of the arrangement with Etheridge the bank had foreclosed its mortgage and the mortgaged premises had been sold by the cashier, Pomroy, and were held doubtless in trust for the bank. The bank had realized no money from the security, and had not appropriated it to any particular debt of Gates to the bank, but it was held as security generally for "all the debts." The effect of the arrangement with Etheridge was, by giving a new security upon property which, as the evidence tends to show; exceeded the debt secured in value, for the notes delivered up and canceled, as between the two funds or securities, the one

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general and embracing all the debts but insufficient to pay a very considerable portion of them, and the other specific to secure a given debt, to make the specific security the primary fund, for the payment of the debt specifically secured by it, and to postpone the right of that debt to participate in the general fund until the specific fund should be exhausted. It is claimed that the cashier held the money realized from the sale of the mortgaged premises, and that it stood to his individual credit on the books of the bank until the appropriation was made. But it was received by him as cashier, for a debt due the bank, and was the money of the bank from the time of its receipt, notwithstanding the breach of trust of the cashier in keeping it nominally separate from the funds of the bank. The bank must be held to have received it at the time it came to the hands of the cashier, which was on the 23d of October, 1856. I pass by the attempted appropriation of over \$800 of it by Pomroy without the knowledge or assent of any other person, to the payment of a debt for which he was personally responsible, with the single remark, that in case it shall ever be investigated a serious question will arise as to his right, acting as the financial officer of the bank, and at the same time as the friend and agent of the present defendant, in relation to the power to appropriate it to relieve himself from a personal liability, and thus act for himself and his two principals, each having distinct interests and the interest of each being distinct and adverse to his own. It is possible it can be sustained against the equal equities of other sureties as well as against the possible interests of the bank, that might, if the right of appropriation was vested in it, have an interest in applying it to some debt of Gates not so well secured as that indorsed by Pomroy. But it is by no means certain. As to the residue, there was no appropriation of it until the 16th of December, 1856, and then Pomroy having paid his debt without difficulty merely by directing as cashier a credit on the books of the bank, Etheridge came in as cashier, and by the same process took to himself the benefit of the

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residue of the fund ; and the debt to the bank not being quite sufficient to exhaust it, he took \$80.56 in cash to balance the account ; so that even if the present defendant had in turn came in as cashier the next day, he could not have had the same benefits of his office that appear to have been taken and enjoyed by his predecessors. I am of the opinion that the acts of Pomroy and Etheridge were insufficient to appropriate the money, and that portion of the debt of Gates which was secured upon the Wisconsin property and by the Etheridge trust. (1.) They were the agents of the bank, occupying a confidential relation towards it, and could not act as such in matters in which they had a personal interest. (*Story on Agency*, § 210 *et seq.* *Moore v. Moore*, 1 *Selden*, 256.) (2.) Pomroy was intrusted by the present defendant to look after his interests and see that he shared in the security equally with the others ; and having undertaken to act in that capacity, it was a fraud upon the defendant to appropriate the funds to his exclusion. (3.) The fund was in the possession of the bank, and if the law did not appropriate it to the several debts due the bank, ratably, the debtor not having appropriated it, the creditor alone, and not the two indorsers acting in hostility to the third, could make the appropriation.

But aside from this, under the circumstances of this case, the bank itself could not, by the solemn act of its directors, have appropriated any part of this fund, realized from the mortgaged premises, to the payment of the notes provided for in the Etheridge trust. Regarding the fund realized from the mortgaged premises as so much money paid by the debtor, without indicating how, or to which of the debts, it should be applied, it was the right of the creditor to make the application of the partial payment in such manner as he pleased ; provided he made the election within a reasonable time, and the application made by him was not inequitable. (*Field v. Holland*, 6 *Cranch*, 27. 15 *Wend.* 19.)

Judge Story says: "If the creditor has a right, in any case, to elect to what debt to appropriate an indefinite pay-

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ment, it seems proper that he should have it only when it is utterly indifferent to the debtor to which it is applied, and then, perhaps, his consent that the creditor may apply it as he pleases, may fairly be presumed." (*Story's Eq. Juris.* § 459, *d.*) In this case it was inequitable in respect to the debtor, as well as to the other sureties, to apply the fund in hand to the debt for the payment of which a specific fund had been provided; and it was not indifferent to the debtor, for by such application he was left liable to be called upon for immediate payment of the debt not thus provided for and paid, while, by a different application, he was relieved from his liability to protect his indorsers, *pro tanto*, who were not specifically secured, and his property was equitably applied to the discharge of his debts. Pothier lays down the rule that "the application ought to be made to the debt for which the debtor has given sureties, rather than to them he owes singly." (*Story's Eq. Juris.* § 459, *c*, note 3. *Marryatts v. White*, 2 *Starkie*, 101.) The honor of the debtor is concerned in such payment. Having provided for the payment of the notes delivered up, he was more particularly interested in providing for the note not thus protected; and justice to the parties bound for him required the application of the fund to these debts, and the creditor had no right to make any other application of the fund. The referee therefore erred in deciding that the moneys realized from the sale of the premises mortgaged by Gates had been exhausted by being applied to the payment of the notes indorsed by Etheridge, and which were secured upon property in Wisconsin.

But within well settled principles, the defendant, without reference to the Eldridge trust, had a right, legal as well as equitable, to share ratably with both Pomroy and Etheridge in the fund and security provided generally for the debts due the bank; and this right could not be affected or impaired by any act of the bank or its officers. The note indorsed by the defendant appears to have been the debt first created in point of time, and to have first matured among the notes held by

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the bank, with the single exception of that indorsed by Chipps, and which was paid with the defendant's consent.

Applying our rule as laid down in the books, to wit, that if debts are contracted at divers times upon the securities of the same farms or mortgages, the moneys arising from the pledges would in such case be applied in the first place to the discharge of the debt of the oldest standing, (9 *Cowen*, 777, note,) the whole fund would be applicable to the payment of the note in suit. But the interest of the parties was doubtless to provide a security for all the debts, and not to secure one debt by the mortgage, and then secure the next debt incurred upon the residue of the mortgage, but rather that all should stand as if contracted at the same time. In such case the debts must share ratably in the fund realized from the security. (9 *Cowen*, *supra*.)

Where a creditor, having several claims against his debtor, receives a portion of the entire amount, in a judicial proceeding founded upon them all, the law will apply such money as a payment ratably upon all the claims. The creditor has no right to apply it to the satisfaction of some of the demands, to the entire exclusion of others. (*Cowperthwaite v. Sheffield*, 1 *Sandf. S. C. Rep.* 416, *affirmed*, 3 *Comst.* 243.)

The moneys realized by the bank were the fruits of a judicial proceeding or sale upon the foreclosure of a mortgage given to secure all the debts, and were therefore within the principle of this case. But the security and its application must be the same whether given by the debtor voluntarily or obtained *in invitum*. It is a principle of equity which controls and gives the rule of law in both cases, and as there is no distinction in principle there can be none in the rule. Before the bank can claim to share in respect to the notes delivered up, the value of the property, or the proceeds of the property, transferred to Etheridge for their payment, must be deducted. (*Cowperthwaite v. Sheffield*, *supra*.) Perhaps a suit in the nature of a bill in equity may be necessary to settle all the equities of the parties. But the judgment must be

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reversed and a new trial granted, for the reasons stated. Some part of the fund was applicable to the note in suit, and must be deemed as actually paid upon it.

Judgment reversed and new trial granted; costs to abide the event.

[ONONDAGA GENERAL TERM, July 3, 1860. *Allen, Mullin and Morgan*, Justices.]

CHARLES H. GREEN, adm'r &c. *vs.* THE HUDSON RIVER
RAIL ROAD COMPANY.

In an action under the acts of 1847 and 1849, to recover damages for a death caused by the wrongful act, neglect or default of the defendant, notwithstanding the discretion vested in the jury, by the statute, it is the province of the court to give them definite instructions as to what may or may not be taken into consideration in estimating the pecuniary loss; and if explicit instructions are refused, when asked for, it will be cause for a new trial

In such an action, brought by a husband, as administrator of his deceased wife, to recover damages for her death, loss of service is a proper item of damages; and it is not erroneous for the judge to charge the jury that they may take into consideration the fact that the deceased was an educated and amiable woman.

The legislature has restricted the damages to a compensation for the pecuniary loss—a loss which may be estimated in money. Hence, damages resulting from the loss of the society of the wife are to be excluded from the consideration of the jury

It is not an action sounding in damages, in which the jury exercise a discretion, and may give a *solatium* in respect to the mental suffering of the party, or a compensation for the loss of *consortium*, as in an action for criminal conversation.

Where the judge charged the jury that pecuniary damages, alone, could be recovered by the husband, suing as administrator, and that loss of service and society was to be taken into the account, as a part of the damages; and the defendant took a single exception to the whole sentence; *Held*, on a case, that the exception was proper; but that if it were otherwise, it being evident that the jury might have been misled by the remark of the judge, a new trial should be granted.

It is erroneous to charge the jury in such an action, that they are not bound to estimate the damages with "precision and nicety."

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Where, in an action against a rail road company, to recover damages for causing the death of the plaintiff's intestate, the negligence of the defendant, and the death of the intestate from such negligence, are admitted by the answer, it is erroneous to admit evidence of what the president of the company said, about settling the claim; inasmuch as the only effect of such evidence would be to prejudice the jury against the defendant, by showing an unconscionable defense, or harsh and oppressive treatment of the plaintiff; neither of which could legitimately influence the amount of the recovery.

THE plaintiff sued as administrator of his wife, to recover the pecuniary damage sustained by her "next of kin" by reason of her death, caused by the negligence of the defendants. The cause was tried at the Oneida circuit, before MULLIN, J. and a jury, in June, 1859. The killing of the intestate by the negligence of the defendants was admitted by the answer. It was conceded, upon the trial, that the defendants had paid to the plaintiff the value of the clothing &c. of the wife, and also the expenses incurred by the plaintiff in and about her care and burial, and no claim was made upon the trial for such damages and expenses. The deceased left no children. It appeared, on the trial, that her mother, an aged lady and incapable of supporting herself by labor and destitute of property, had for many years resided in the plaintiff's family, that the deceased was very much devoted to her, and that the mother still lived with the plaintiff. This evidence was objected to by the defendant and admitted by the court. In the progress of the trial the plaintiff proposed to prove an interview between the attorney for the plaintiff and the president of the defendants, and "what the president said in reference to settling with the plaintiff." This was objected to as incompetent and immaterial, and admitted by the court, and the witness testified "that Mr. Sloan, the defendants' president, refused to settle, and said the company had made up its mind not to pay any thing." Exception was taken to the ruling of the court, and the admission of the evidence objected to. The judge charged the jury that the action could be maintained, and to this the defendants excepted. He also charged them that the question for them to determine was, what pe-

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cuniary damages the plaintiff had sustained by reason of the death of his wife, and they were not to consider what damages the mother of the deceased had sustained. He further charged "that the pecuniary damage the husband had sustained was a matter wholly for them to determine, in view of all the circumstances of the case, taking into consideration the loss of the services and society of the deceased, and the fact that she was an educated and amiable woman." To this part of the charge the defendant excepted. He further charged "that the jury were to give the pecuniary damages which the plaintiff had fairly sustained. They were not at liberty to estimate the damages extravagantly; nor were they to increase the damages because the defendant was a corporation; nor to take into consideration the degree of negligence of which the defendant had been guilty, to augment the damages; nor were they at liberty to give any damages by way of punishment of the defendant, or to increase them because the defendant refused to pay damages, when called upon in behalf of the plaintiff; on the other hand they were not bound to estimate the damages with precision and nicety." To this part of the charge the defendants also excepted. The jury were also charged that "they were at liberty to estimate the damages with liberality, but they were to give nothing but such pecuniary damages as in their judgment the plaintiff had sustained, upon the evidence." The jury found a verdict for the plaintiff for \$2000, and from the judgment entered thereon the defendant appealed.

F. Kernan, for the appellant.

C. H. Doolittle, for the respondent.

ALLEN, J. This court having decided, upon a demurrer, that the action is maintainable, the judgment then given is decisive of the same question renewed upon the trial of the issue of fact. I dissented from the decision of the demurrer,

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for reasons which appeared to me entitled to weight, but which failed to convince my brethren; and while I yield to the authority of the decision, I am constrained to withhold my assent from it as a sound exposition of the law. The statute authorizes an action to be brought when death is caused by the wrongful act, neglect or default of another, "for the benefit of the widow or next of kin of such deceased person," and authorizes the jury to give damages "with reference to the pecuniary injuries resulting from such death to the wife or next of kin." (*Laws of 1847, p. 575. Laws of 1849, p. 388.*) In the English statute of 9th and 10th Vict. c. 93, upon the same subject, "the wife, husband, parent or child" of the person whose death is complained of, are the persons named, and for whose benefit the action may be brought. In our statute it is the "wife and next of kin." The husband is not named, and it is some evidence that "next of kin" was used in its legitimate and proper sense that the wife is especially named. The legislature evidently had not the vague idea that "next of kin" included every one who could, by reason of mere relation to the deceased, share in his estate. All the cases agree that to maintain the action, there must be either a wife or next of kin to the deceased who have sustained a pecuniary loss by the death. There is certainly no widow in this case, who can be benefited by the money, and the husband is in no sense of the word "next of kin" to the wife. The term is used to signify the relations of a party who has died intestate. No one, ordinarily and without something to indicate a different intent, comes within this term who is not included in the provisions of the statute of distributions. (*Bouvier's Law Dic. h. t. Hinckley v. Maclaren, 1 M. & K. 27. Leigh v. Leigh, 15 Vesey, 92. Garrick v. Lord Camden, 14 id. 372.*) If the husband could have been entitled as "the next of kin" the wife need not and would not have been especially named. She is provided for in the statute of distributions with the next of kin, and there was less reason for naming her

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than for naming the husband, if both were intended to be brought within the terms of the act.

It is somewhat significant that the pleader, by whom the complaint was prepared, did not count the plaintiff among the next of kin and thus within the provisions of the act. After the statement of the cause of action, he says, "whereby and by reason of the premises said Charles H. Green, the husband of the said Eliza, said Margaret Ford, the mother of the said Eliza and the next of kin of the said Eliza, suffered great damage and pecuniary damage to the amount of \$5000 and upwards." (*And see Lynch v. Davis*, 12 How. 323.) But the judgment of the court upon the demurrer is the law of the case, and the judge at the trial properly ruled that the action lay.

The general tenor of the charge was right, assuming that the action could be maintained, so far as it restricted the right of recovery to the pecuniary loss of the plaintiff; but exceptions were taken to specific portions of the charge, as authorizing the jury, in assessing the damages, to take into consideration circumstances and losses which did not and could not enter into an estimate of the pecuniary damages.

The jury were made the judges of the measure of damages, and the only restriction is in the statute giving the action, which limits the recovery to \$5000, and defines the nature of the damages to be allowed. "The jury may give such damages as they shall deem a fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person." (*Laws of 1849, ch. 256, § 1.*) Notwithstanding the discretion vested in the jury, it is the province of the court to give them definite instructions as to what may or may not properly be taken into consideration in estimating the pecuniary loss; and if explicit instructions are refused when asked to be given, or erroneous instructions given, it will be cause for a new trial. (*Blake v. Midland Railway Company*, 18 Adol. & E. N. S. 93.) That the action is of recent

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origin, and the act by which it is given, if not somewhat obscure in its terms, at least is difficult of construction, furnishes a good reason why instructions should be very carefully guarded; and courts should see that the jury have not either been misguided or left with uncertain and doubtful directions. After having directed the jury that the defendants were liable only for pecuniary damages, to the plaintiff, the judge referred to the circumstances to be considered by them in the assessment of such damages. He told them, in substance, that the pecuniary damages were to be determined in view of all the circumstances of the case, taking into consideration the loss of the services and society of the deceased, and the fact that she was an educated and amiable woman. This was but the statement of two distinct propositions: 1st. That pecuniary damages alone could be recovered; and 2d. That loss of service and society was to be taken into the account as a part of the damages. If this were so, the exception being general to both and the first being correct, the exception would not be tenable. But this not being a bill of exceptions but a case, if the charge was such as would be likely to mislead the jury, the court might grant a new trial, although the exception was technically too broad. The statement was, however, evidently intended, when read in connection with the parts of the charge which had preceded it, to state the elements which went to make up the pecuniary damages for which the plaintiff might recover. Loss of service was a proper item of damages, and to this extent no complaint is made, and there was no error, either, in saying to the jury that they might take into consideration the fact that the deceased was an educated and amiable woman. The pecuniary interest of a husband might and could be advanced more by a wife possessing these characteristics, than by one of an opposite character and temperament. The services of a refined and amiable wife would, upon the truest scale of pecuniary estimate, be more valuable than those of a vulgar and unamiable shrew. But the judge united loss of society with loss of service, and in respect to

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both referred to the qualifications of the deceased. And as refinement of mind and manners would more greatly enhance the value of the society than that of mere service or labor for profit, if loss of society was not a "pecuniary loss" to be compensated for within the statute, the allusion to the qualifications of the wife, in that connection, may have readily enhanced the damages. The English statute, which did not in terms limit the damages to the "pecuniary loss" sustained by the party for whose benefit the action might be brought, but empowered the jury to "give such damages as they might think proportioned to the injury resulting from such death, to the parties respectively for whom and for whose benefit such action should be brought," received a construction in *Blake v. The Midland Railway Company*, (*supra*.) It was decided, 1st, that the jury could give compensation for pecuniary loss only; and 2d, that in estimating damages they could not take into consideration mental suffering or loss of society. Baron Parke, on the trial, left it to the option of the jury to give damages on all or any of the grounds mentioned, intimating his opinion that there was no ascertainable damages on any ground but that of pecuniary loss, and a new trial was granted, for a misdirection. In this state the legislature have restricted the damages to a compensation for the pecuniary loss, a loss which may be estimated in money. It is not an action sounding in damages, in which a jury exercise a discretion and may give a *solatium* in respect to the mental suffering of the party, or a compensation for the loss of *consortium*, as in an action for criminal conversation. Pollard, C. B. ruled at nisi prius, in *Gillard v. Lancashire and Yorkshire Railway Company*, (reported in 12 *Law Times*, 356, and cited by counsel arguendo *Blake's case*,) which was an action for the benefit of a widow, for the damages resulting from the death of her husband, that it is utterly impossible for a jury to estimate any sum as a compensation for the injured feelings of the survivor; that all that is left which was applicable was the pecuniary loss sustained by his family. He said, "The

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framers of the act never could have meant to give compensation to the parent for the mere deprivation of his son, or to the widow for that of her husband." The plaintiff's counsel observed, "In that view a widower would not be entitled to sue for compensation for the loss of the society and comfort of his wife." And the lord chief baron said, "Clearly not, unless her death is the cause of a pecuniary loss to her husband." The damages are to be calculated on a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life. At the best the measure of damages must be somewhat indefinite, and much must be left to the good judgment of the jury, but they must confine their inquiries to the pecuniary loss. (*Franklin v. The South Eastern Railway Company*, (3 *Hurlston & Meriam's Rep.* 211;) *Pennsylvania Rail Road Co. v. McClaskey*, (23 *Penn. Rep.* 525.) *Safford v. Drew*, (3 *Duer*, 627,) supports this view of the act, and is an authority for excluding from the consideration of the jury the loss of the society of the deceased wife. The superior court affirm the decision of the queen's bench in *Blake's case*, (*sup.*) and apply its principles to the interpretation of our own statute. *Oldfield v. The New York and Harlem Rail Road Co.*, (14 *N. Y. Rep.* 310,) decides, 1st. That there need be no proof of any pecuniary or special injury sustained by the next of kin, but in the absence of such proof a recovery for nominal damages, at least, may be had; 2d. That it is not necessary that the next of kin should have a legal right to pecuniary benefit from the continuance of the life of the deceased; and 3d. That the damages may be assessed in reference to the prospective as well as the present loss. The two last propositions were involved and decided in *Franklin's case*, (*supra*;) the court holding that a reasonable expectation of a pecuniary benefit to the party was sufficient. But Judge Wright does say that the jury "were not to compensate for the pain and suffering endured by the deceased, or the anguish and mental distress of a wife or children incident to the loss of a husband or father, but were to measure the compensation by the pecun-

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itary injury exclusively," and to this extent affirms the doctrine of the court of queen's bench. *Quin v. Moore*, (15 *N. Y. Rep.* 432,) is put upon the ground that the mother, by the death of her son, was deprived of his services to which she was entitled until he became of age. No pecuniary damage can be predicated upon the loss of the society of the wife. It is a case for which money cannot compensate, and cannot be estimated in money. A pecuniary loss is a loss of money, or of something by which money or something of money value may be acquired. See *Beach v. Ranney*, (2 *Hill*, 309,) and the cases cited by Bronson, J., and *Ransom v. The New York and Erie Rail Road Company*, (15 *N. Y. Rep.* 415.) The exception was proper to the entire sentence, which contained but one proposition, and that related to the considerations which might influence the jury in the assessment of damages. The judge united loss of society and loss of service as proper to be taken into the account, and both were included in the single proposition, and the counsel for the defendant very properly submitted a general exception to that proposition. But if this were not so, it is quite evident that the jury may have been misled by the remark of the judge, and a new trial should be granted.

Another part of the charge to which an exception was taken, or to which it is now claimed an exception was taken, is a part of a paragraph of some length in which several propositions are laid down, and which is only separated by a semicolon from the residue of the sentence. It is, "on the other hand they (the jury) were not bound to estimate the damages with precision and nicety." This exception being general, following the entire paragraph, and "to this part of the charge" is too general, as every other proposition except the one indicated is perfectly right. The remark was not a happy one. If it was intended merely to say that the law prescribes no rule by which the damages could be definitely ascertained and measured, it was very proper and very true. But if it was intended to advise the jury that they were not to arrive

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at the actual damages with all the accuracy of which the case was susceptible, having reference to the pecuniary loss of the party in interest, it was erroneous, as it gave to the jury a latitude and a discretion expressly withheld from them by the statute. One exception to the admission of evidence, I think, was well taken. The defendant objected to evidence of what the president of the defendant said about settling the claim. The negligence of the defendant, and the death of the intestate from such negligence, was admitted by the answer, and the only effect of the evidence would be to prejudice the jury against the defendants by showing an unconscionable defense or harsh and oppressive treatment of the plaintiff, neither of which could legitimately influence the amount of the recovery. It is true the judge instructed the jury that the conduct of the defendant, or their president, in refusing to settle the claim, should not be taken into consideration in enhancing the damages. But the evidence was admitted as competent and material, and had its effect before the antidote was administered, and too late for the antidote entirely to counteract it. (*Worrall v. Parmelee*, 1 Comst. 519. *Osgood v. The Manhattan Co.*, 3 Cowen, 612.) The judgment must be reversed, and a new trial granted; costs to abide the event.

MORGAN, J. concurred.

MULLIN, J. concurred in the result, on the last ground, to wit, the admission of the declarations of the president of the defendants in evidence.

Judgment reversed.

[ONONDAGA GENERAL TERM, July 7, 1860. *Allen, Mullin and Morgan*, Justices.]

THE PEOPLE *vs.* THE MAYOR & C. OF THE CITY OF NEW YORK.

The attorney general may bring an action in the name of the people, to restrain a municipal corporation from exercising authority, in making a contract, or performing similar acts, not possessed by it under its charter or by law.

The passing of a resolution, by the common council of a municipal corporation, directing one of the departments to give a contract for work and labor to specified persons, is a legislative act, and cannot be restrained by injunction. But after such a resolution has been passed, on a proper case being shown for relief, an injunction may issue to prevent the resolution from being carried into effect.

In an action brought in the name of the people, for the purpose of obtaining such an injunction, on the ground that by the resolution the common council did not give the contract to the lowest bidders, as required by law, neither the contractors nor the bidders need be made parties.

The clause of the 38th section of the act of April 14, 1857, amending the charter of the city of New York, which provides that whenever any work is necessary to be done to complete or perfect a particular job, &c. for the corporation, which shall involve the expenditure of more than \$250, the same shall be by contract, &c. does not include work forming part of a job which, in a contract for the residue of the job, appears to have been intentionally excluded, to be let in future, or to be otherwise done.

THIS action was brought by the attorney general, on behalf of the people, for the purpose of obtaining an injunction to restrain the defendants from passing any resolution directing the Croton Aqueduct Department to give the contract for building the gate-houses and aqueduct for the new reservoir, to Fairchild, Walker & Co. or to any other person, except upon bids made in pursuance of law. The ground of the action was that the common council had passed, in one board, and were about to pass in the other, a resolution directing the contract to be given to Fairchild, Walker & Co., who were alleged to have been the highest and not the lowest bidders, when proposals were received for that work; and that the resolution, if carried out, was a direct violation of section 38 of the amended charter of 1857, which directs the mode of giving such contracts, and requires them, in all cases, to be given to the lowest bidder. The complaint charged the acts complain-

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ed of, to be a usurpation on the part of the municipal authorities, and in conflict with the provisions of the amended charter.

A motion for an injunction had once before been made, at a special term held by Justice INGRAHAM, and was denied, without prejudice to a renewal of it, on further papers. (9 Abb. 253.) This was a renewal of the motion.

David Dudley Field, for the plaintiffs.

R. Busted and *L. R. Marsh*, for the defendants.

T. R. STRONG, J. It is apparent, from the opinion of Justice Ingraham, on the decision of the motion made before him in this case, at special term, for an injunction, and I have also learned from conversation with him on the subject, that he intended to decide for the purpose of the motion, that the attorney general has authority to bring an action in the name of the people, to restrain a municipal corporation from exercising authority in making a contract, or performing similar acts, not possessed by it under its charter, or by law. He denied the motion in respect to a restraint to that extent in this case, on the ground that it did not appear that the defendants were about to do the acts of that nature stated in the complaint, except upon information and belief, which was not sufficient. This defect existed in the plaintiff's papers; but it appears to have been supplied by papers introduced by the defendants, and the fact to have escaped the attention of the court. The further papers now produced by the plaintiffs remove this ground of objection.

On this renewal of the motion, in pursuance of the leave given therefor, I shall not examine the question as to the right of the attorney general to bring this action, but shall follow the decision of Justice Ingraham, on that point, and allow the plaintiffs an injunction, if they have made a case in other respects which calls for such an interposition by the court.

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The prayer of the complaint is that the action of the defendants, in passing a resolution directing the Croton Aqueduct Board to have the gate-houses, aqueduct and their appurtenances, for the new reservoir, constructed by Fairchild, Walker & Co., under the contract made with them on the 2d of April, 1858, &c. be adjudged to be without authority and a usurpation of power; and that the defendants be enjoined from passing the resolution, or any resolution, directing the work to be done by those persons, or any person, except the same be awarded in the ordinary way upon sealed bids made in pursuance of notice; that the defendants also be enjoined from employing said persons, or any person, to construct said work; and that the defendants be prohibited from carrying out the provisions of said resolution. It is set forth in the complaint that the resolution had been passed by the board of councilmen and the board of aldermen; that it had been vetoed by the mayor, and re-adopted by the board of councilmen by a vote of sixteen to three; and that the same was before the board of aldermen for their concurrence. The other papers now before the court show that the resolution was again passed by the board of aldermen on the 5th of September, 1859, the same day the complaint was verified; two thirds of all the members elected having voted therefor, whereby it became adopted.

It was held by Justice Ingraham that passing the resolution was a legislative act, and that the defendants could not be enjoined from any legislation they might deem proper; and following that decision, aside from the facts that the resolution has passed, and is in force as far as it could be made operative by the defendants, I shall hold that an injunction against the passage of the resolution cannot be granted.

In regard to the residue of the relief sought—that the defendants be enjoined from employing Fairchild, Walker & Co., or any person, to construct the work mentioned in the resolution, and that the defendants be precluded from carrying out

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the provisions of the resolution—several questions have been raised, which must be considered.

The theory of the complaint being that the defendants are about to carry out the resolution, by employing Fairchild, Walker & Co. to do the work, without lawful authority, and to the injury of the public, I perceive no reason why any persons should be united with the present plaintiffs or defendants as parties to the action. Baldwin & Jacox, to whom as the lowest bidders, in pursuance of due notice inviting proposals, the Croton Aqueduct Board awarded the contract for constructing the gate-houses, pipe-chamber and aqueduct, on the 27th of October, 1858, have no right to the work under the award, before confirmation of the contract by the defendants. (*Laws of 1857, ch. 446, §§ 32, 33. Ordinances of N. Y. City, of 1855, § 494. The People ex rel. Dinsmore v. The Croton Aqueduct Board, 6 Abb. 42.*) But if it were otherwise, and their rights should be infringed, they would have an ample remedy by action. They have not a pretense of claim to an injunction, and nothing is demanded injurious to their interests.

Fairchild, Walker & Co. have no interests, legal or equitable, involved in the litigation. So far as their contract for constructing the reservoir embraces the work in question, it is not sought to be, and will not be, affected by the result of this action. They will be entitled to perform their contract, and to damages if the contract is violated by the defendants.

- The rights under their contract are in no way in question to their prejudice; and they have no rights under the resolution directing the Croton Aqueduct Board to employ them to do the work specified in it.

It is claimed by the defendants that they have the power to give this work to Fairchild, Walker & Co. without any letting or contract, by a three-fourths vote, under § 38 of the Laws of 1857, ch. 446. That section, after providing that all contracts to be made or let by authority of the common council, for work to be done or supplies to be furnished, shall be made by the

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appropriate heads of departments, under such regulations as shall be established by the common council, proceeds: "Whenever any work is necessary to be done to complete or perfect a particular job, or any supply is needful for any particular purpose, which work and job is to be undertaken or supply furnished for the corporation, and the several parts of said work or supply shall together involve the expenditure of more than \$250, the same shall be by contract, under such regulations concerning it as shall be established by ordinance of the common council, unless by a vote of three-fourths of the members elected to each board it should be ordered otherwise." The section next provides that all contracts shall be entered into by the appropriate heads of departments, and shall be founded on sealed bids, &c. Assuming that the contract of Fairchild, Walker & Co. does not embrace the gate-houses, &c. I do not think that the work can properly be regarded as "work necessary to be done to complete or perfect a particular job," &c. within the fair meaning of those words in the section cited. That clause cannot include work forming part of a job which, in a contract for the residue of the job, appears to have been intentionally excluded, to be let in future, or to be otherwise done. A contrary construction would, to a great extent, defeat the policy of the provision, by making its evasion by three-fourths of each board entirely easy. In any case of an extensive work a small part might be let to the lowest bidder, according to the charter, and the residue procured to be done under the clause referred to. The clause was, doubtless, intended for cases of work omitted in a contract from inadvertence, or the necessity of which, to complete a job, was unforeseen when the contract was made.

Another position of the defendant is that the work in question is covered by the terms of the contract of Fairchild, Walker & Co., and therefore there is no ground for granting an injunction. If the work is within that contract, an injunction against a new employment of those persons, and the carrying out of the resolution, would certainly be harmless.

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That fact, however, is not a reason for issuing an injunction. But if the contract of Fairchild, Walker & Co. does not cover that work, the resolution for their employment to do the work was unauthorized, and the carrying out of the resolution by the defendants, or a new employment by them of Fairchild, Walker & Co. to do the work, would be illegal. After a careful examination of the contract, and much consideration of the question, I am satisfied that the contract does not, by a just and proper construction, embrace the entire work of the construction of the gate-houses, aqueduct and their appurtenances. On the contrary, I think it apparent on the face of the contract, that this work, with the exception of such parts of it as would be performed by doing work plainly and particularly and not in general terms, specified therein, was intended to be excluded from the contract. The 4th and 13th specifications provide for excavations of areas for the foundations of the gate-houses, and making excavations for the foundations of the gate-houses, pipe-vaults, laying pipes, and the aqueduct &c., of such depths &c. as the engineer may direct; but beyond that, I find no provision, in terms, for building the gate-houses by those contractors. The absence of such a provision is strong evidence that it was not intended to bring that provision within the contract. In addition to that the 26th specification clearly contemplates that this work will be done by other persons. The language is, "During the construction of the masonry of the gate-houses, pipe-vaults, conduit, the laying of pipe and other necessary work, the Croton Aqueduct Board reserves the control of so much ground as the engineer may deem necessary for the proper accommodation in the construction of such works, and of the persons employed on them." General language in the specifications must be construed in connection with this clause, and so limited in interpretation as to allow the clause an effect in accordance with its obvious meaning.

It is impossible for the court, and the court ought not if it could, upon this motion, to decide precisely how far Fairchild,

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Walker & Co. are entitled, under the contract, to do work which will be in aid of the construction of the gate-houses, and other things mentioned in the 27th specification. If the construction of the gate-houses is not committed to those persons, by their contract, as I have already expressed the opinion it is not, that is sufficient to call upon the court to prevent, by injunction, the execution of the resolution of the defendants for giving them the work, and to prevent any new employment by the defendants of those persons to construct the gate-houses &c., except by contract founded upon a sealed bid or proposal, as provided in section 38, above referred to, of the law of 1857; the injunction not, however, to affect the rights of Fairchild, Walker & Co. to perform, or the right of the defendants to permit performance of, the present contract according to its terms.

I think the complaint sufficient as a pleading, to warrant the relief demanded, to that extent. As a pleading it sufficiently shows an intention by the defendants, beyond the passing, to carry out or execute the resolution. In regard to a public injury, it shows that according to the bid of Baldwin & Jaycox for the work, there would be a saving to the corporation of New York by letting the work pursuant to the charter, instead of having it done under the contract of Fairchild, Walker & Co. upon a single item of the work, of \$16,730.

An undertaking must, however, be executed on the part of the plaintiffs, as a condition of granting the injunction, in a sum and with such sureties as shall be approved by the court, on one day's notice to the defendants, and be duly approved and filed.

An injunction is ordered, according to this opinion, upon an undertaking being first given within ten days.

[NEW YORK SPECIAL TERM, December 5, 1859. *T. R. Strong*, Justice.]

WILLIAM H. RICHARDS, in his own right, and as Trustee,
&c. *vs.* THE NORTHWEST PROTESTANT DUTCH CHURCH and
others.

38 42 The right of burial, when confined to a church-yard, as distinguished from a
80h 200 separate independent cemetery, although conveyed with the common formula of "heirs and assigns forever," must, it seems, stand upon the same footing as the right of public worship in a particular pew of the church.

It is an *easement* in, and not a title to the freehold; and must be understood as granted and taken, subject (with compensation, of course,) to such changes as the altered circumstances of the congregation or the neighborhood may render necessary.

Although a deed purports to convey a certain specific piece of ground, and stipulates that it shall "never be dug up, disturbed or destroyed," yet if it describes the premises as belonging to a church corporation, as adjacent to a church edifice, as in a church-yard, and to be used exclusively as a place of interment, and subject to church assessments for regulation and repair, both parties will be held to have considered it as the grant of a mere easement, and not of an ordinary absolute estate in fee.

Like the sale of a church pew, which gives the mere right to worship in the particular place while the church stands and is occupied for religious purposes, the sale of a church vault gives, it seems, the mere right of interment in the particular plat of ground, so long as that and the contiguous ground continues to be occupied as a church-yard.

In case of disturbance the owner may be, and no doubt is, entitled to compensation, but he cannot have an injunction to prevent the disposition of the soil, and the removal of the remains therein deposited, should the court, on application by the officers of the church, deem such disposition proper, and order it accordingly.

THIS was an action to obtain a perpetual injunction against the defendants, to restrain them from removing the remains of the plaintiff's relations from a certain vault owned by the plaintiff, and from destroying the vault. The church was located in Franklin street, in the city of New York, and by the deed for the vault to the plaintiff, it was stipulated in precise terms that the vault should "never be dug up, disturbed or destroyed." The complaint in the action set forth that the officers of the church had agreed to sell the property, including the above vault, and that they had already removed

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some of the remains of the plaintiff's relations from the vault, and without his consent or knowledge.

ROOSEVELT, J. The plaintiffs claim to be vault owners in the church-yard of the Dutch church in Franklin street, lately sold under an order of the court. They demand that the defendants be compelled to replace the bodies which have been removed to Greenwood, to restore the vault to its original state, and to refrain, under pain of commitment, from any further interference with their rights.

The character and legal attributes of burial property, as distinguished from ordinary absolute ownership in fee, are not perfectly clear. In the present case a preliminary injunction was at first granted by one of the judges, but on a further, although not final, hearing by the same judge, was dissolved. The remains of the deceased relations had already been removed, and removed, I must say, to a much more suitable, if less legal, resting place, than the heartless bowels of a noisy, bustling, money-making city. Nothing is left, therefore, now that all the pleadings and proofs are before the court, but to determine the mere dry, legal rights of the parties. Were it otherwise, however, and could the dead, without rising, speak, a voice, it seems to me, (in the apt quotation of Mr. Justice Mitchell,) would assuredly be heard saying, "Ye shall carry up my bones from hence."

Franklin street, between Church street and West Broadway, has lost every attribute of repose. Its unfitness for a cemetery its spiritual bodies can see and feel must be as palpable to the dead as to the living; still the plaintiffs insist that there shall be no removal, and that, as matter of legal right, without their consent there can be none.

In 1817, the corporation of the church, it appears, without any previous order of the chancellor, conveyed a small piece of ground in the church-yard, adjoining the church edifice, to the grantee, "his heirs and assigns, forever," to be used, in the language of the instrument, for the purpose of a burial place,

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and for no other purpose whatever. In this plot the grantee, soon after his purchase, constructed a vault, which became the depository, from time to time, of his own remains and those of deceased relatives, till the year 1852, when, on the petition of the corporation of the church, an order was made by this court, authorizing a sale of the church edifice, and of the whole church premises, including the ground in question. A sale was accordingly made, and on report of its terms and conditions, was duly confirmed, and the bodies thereupon, with the approbation of a large majority of the relatives, decorously removed to a suitable burial place, purchased for the purpose, in the cemetery at Greenwood.

Did the sale then, thus authorized and confirmed, divest the title of the representatives of the grantee in the vault which their ancestor had purchased?

The right of burial, it seems to me, when confined to a church-yard, as distinguished from a separate independent cemetery, although conveyed with the common formula of "heirs and assigns forever," must stand upon the same footing as the right of public worship in a particular pew of the consecrated edifice. It is an easement in, and not a title to, the freehold, and must be understood as granted and taken, subject (with compensation, of course,) to such changes as the altered circumstances of the congregation or the neighborhood may render necessary. The selection of a place of burial in the ground, forming the site of a church, we may safely say is always made with reference to its religious associations, and with an eye to their continuance. Suppose the edifice to be destroyed by fire, without the means of rebuilding, (an event not entirely improbable or unprecedented,) must the premises continue an unsightly ruin, with no power any where to meet the emergency? Or must we not rather, from the nature of the contract, and from the character of the subject of its provisions, infer a silent understanding between the parties (quite as operative as if expressed in words at length) that in such case the corporation of the church—in other words, the rep—

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representative body of whom the pew owners, vault owners, and other members of the particular religious associations may be said to be the constituents—should sell the real estate which had become unfit for its original object, and “with the consent and approbation of the chancellor, apply the moneys arising therefrom to such uses as they should conceive to be most for the interest of the society to which the real estate so sold belonged.”

Every deed of conveyance, whether for a pew or vault, or a house, is a contract between the parties, to be interpreted according to their actual or fairly to be presumed intent.

The statute—to prevent all doubt on this point—makes it, in terms, the “duty” of all courts of justice, “in the construction of every instrument creating or conveying any interest in land,” to carry into effect “the intent of the parties.” (1 R. S. 748.) This intent—the statute further provides—shall be “collected from the whole instrument,” and of course from its scope, object and subject matter, and not from the mere letter of a particular sentence. Although, therefore, the deed in question purports to carry a certain specific piece of ground, twelve feet by twenty, we must bear in mind that it describes the premises as belonging to a church corporation, as adjacent to a church edifice, as in a church-yard, and to be used exclusively as a place of interment, and subject to church assessments for regulation and repair. In this view, both parties, it seems to me, the one in executing, the other in accepting the conveyance, must have considered it as the grant of a mere easement, and not of an ordinary absolute estate in fee. And hence no order of the chancellor was applied for, and in that view none was required. Although such order, in all cases of church property, is indispensable to an absolute conveyance of the soil.

Like the sale of a church pew, which gives the mere right to worship in the particular place while the church stands, and is occupied for religious purposes, the sale of a church vault gives, it would seem, the mere right of interment in the

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particular plot of ground, so long as that and the contiguous ground continues to be occupied as a church-yard. The owner of the easement may be, in case of disturbance, and no doubt is, entitled to a reasonable compensation or equivalent, but he cannot interpose a veto to the disposition of the soil, should the court, as was actually the case in this instance, on application of the legitimate church officers, deem such disposition proper, and order it accordingly.

Every person purchasing either a pew in a church edifice, or a grave in a church-yard, appendant to a church, does so with the full knowledge and implied understanding that change of circumstances may, in time, require a change of location; and that the law, (a positive statute which has been in existence nearly half a century,) looking to such exigency, authorizes the corporation, when it arrives, as the representative of all interests, with the sanction of the court, to sell the soil in absolute fee, discharged of all easements, and to make some other more appropriate investment or disposition of the proceeds.

Counsel have cited several authorities in support of their respective positions. They all concede that such rights, however strongly conveyed, are divested by a regular sale of the church edifice. Those relating to vault rights are discordant and neutralize each other. Vice Chancellor McCoun, in the Brick Church case, held one way, and Mr. Justice Edwards, in that of another church, held the opposite. (*See 3 Edw. Ch. Rep. 155, and 8 Barb. 130.*)

The reasoning, which leads to the result arrived at in the case of church pews, is applicable, as it seems to me, in a great degree to the case of church vaults. It proceeds upon the assumption—a necessary assumption—that church grants in such cases are made upon the implied condition, that the land shall be subject to the right of what may be called eminent domain—that is, subject to the right of resumption whenever the public use, or a change of circumstances may, in the judgment of the church and of the court, require the exercise of such right, but subject also to the duty of making

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a just and fair compensation, in the form of money or other suitable equivalent, if required.

As the complaint in this case only calls in question the validity of the sale, and is not adapted to a claim for compensation, it must be dismissed with costs.

[NEW YORK SPECIAL TERM, December 5, 1859. *Roosevelt*, Justice.]

DWIGHT *vs.* WEBSTER and others.

In an action brought to foreclose a mortgage containing a clause making the principal due in case of default in paying the interest for a certain number of days, it is not a valid defense, or ground of relief, that the defendants were unable to find the holder of the mortgage, until after the time for paying the interest had passed; where the answer does not allege any trick or fraud on the part of the plaintiff, to prevent the payment of interest.

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76h 328

THIS was a motion to open and set aside a judgment entered by default, at a special term.

LEONARD, J. This action is brought to foreclose a mortgage, containing a clause making the whole principal sum due in case the interest shall remain unpaid for a certain number of days after it has become due. The complaint alleges a default in the payment of the interest, under this clause. The answer admits this default, but alleges, as an excuse, that the defendants were unable to find the holder of the mortgage until after the period required for the payment of interest, in order to prevent the whole principal from becoming due, had expired. A judgment by default has been taken, at special term, which the defendants now apply to set aside.

If the answer set up a valid defense, the motion ought to prevail. The answer does not allege any trick or fraud on the part of the plaintiff, to prevent the payment of interest. It simply presents the misfortune of the defendants in being unable to find the plaintiff, in season. This does not present

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any fault on the part of the plaintiff, which would prevent him from insisting on a fulfillment of the terms of the mortgage. Nor is it such an accident or misfortune as will enable the court to afford the defendants any relief. The case of *Ferris v. Ferris* (16 How. Pr. Rep. 102) is decisive of this question.

It is not necessary to refer to the other facts contained in the affidavits, as the view which I have taken of the answer is conclusive against the legal force of the whole defense.

[AT CHAMBERS, New York, January 2, 1860. *Leonard*, Justice.]

In the matter of WHITLOCK.

Upon an application by infants for an order directing the sale of their real estate, it is not necessary that a next friend should be appointed, to present the petition. The court may grant the order upon a petition presented in behalf of the infants by their mother, as their natural guardian.

Where a deed of city lots conveys the same subject to a reservation or covenant that five feet of the front thereof shall not be built upon or used, except for steps &c., this is an *incumbrance* on the lots, restricting the owner in the use thereof, and if not excepted, in a contract of sale which stipulates for a title free from incumbrances, nor known to the purchaser when he bought, justifies him in refusing to perform.

THIS was a petition for an order to compel a purchaser of premises sold by a special guardian of certain infants, under an order of the court, to complete his purchase and receive a deed for the premises.

BONNEY, J. Upon a petition in this matter, James B. Wilson has been appointed special guardian of Mary Jane Whitlock and others, infants, and under an order of the court a contract has been made for the sale of their real estate in the city of New York; which contract has been reported to, and approved by the court, and said guardian has been, by another order, authorized and directed to carry such contract

 In the matter of Whitlock.

into effect, and to convey the property, on receiving payment therefor. The purchaser of the real estate refuses to pay the consideration and receive the deed therefor, executed by said special guardian, upon two grounds:

1. He insists, under advice of counsel, that the appointment of said special guardian, and all the subsequent proceedings in this matter are void, for the reason that Elizabeth M. Whitlock, by whom, on behalf of said infants, and as their next friend, the original petition was presented, was not authorized to represent the said infants, nor to make the application on their behalf.

This is a strictly statutory proceeding, and unless the requirements of the statute have been complied with, no title will pass by the deed. (*Rogers v. Dill*, 6 *Hill*, 415.) The statute provides that any infant seised of real estate may, by his *next friend* or by his *guardian*, apply for the sale or disposition of the same; and that *on such application* the court shall appoint a guardian, &c. (2 *R. S.* 5th ed. 275, §§ 100, 101.)

Mrs. Elizabeth M. Whitlock, by whom, acting as next friend of said infants, the application to the court in this matter was made, was not by any court or legal proceeding, appointed such next friend; but, being the mother, nearest relative, and next of kin of such infants, and as such their *natural guardian*, she assumed the title of their "next friend," and in that character presented the original petition. Was she such "next friend" within the meaning and intentment of the statute above referred to?

In this state provision has been made by statute for the *appointment* of a next friend or guardian to *prosecute or defend any action* that may be brought by or against an infant, who can appear and prosecute or defend only in the manner so provided. (1 *R. S.* 416, § 2. 2 *id.* 445, &c., §§ 1—12, and 232, §§ 40, 43. *Code*, §§ 115, 116.) In other cases of legal disability, also, provision has been made for the prosecution and defense of actions by or against persons incapable of

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acting on their own behalf. (2 R. S. 142, §§ 20—34.) Before these enactments, there appears to have been no settled practice or certainty in relation to the appointment, duties or responsibilities of the next friend of an infant plaintiff. (*Dan. Ch. Pr.* 90, &c. *Story's Eq. Pl.* § 57, &c. 1 *Hoff. Ch. Pr.* 54, &c., and cases there referred to.)

The statute under which the proceeding now in question was had is wholly distinct from the statutes above mentioned, which provide for the appointment of a next friend or guardian of an infant *party to an action*. The words of the statutes are not the same; and the purposes for which a next friend appears and acts, under said statutes, respectively, are wholly different. The next friend of an infant plaintiff directs, and is responsible for the prosecution of the action, and is also liable for the costs of the defendants, and to account to the infant whom he represents, for the proper prosecution of his claims, and for any money or property which he may recover or obtain thereby. It is, therefore, eminently proper that such next friend be approved of and appointed by the court, and required (if necessary,) to give security for the performance of his duty.

In the proceeding now in question (which is not an action,) the guardian or next friend authorized by the statute to make the application has no duty to perform, or power to act, except merely to bring the matter before the court, which then takes cognizance of the proceeding, and appoints a responsible guardian, authorized to act on behalf of the infant, and takes security as provided by statute, for the faithful performance, by such guardian, of his duty. If the "next friend," before he can present the petition, must be appointed by the court, who shall make the application for his appointment? The statute makes no provision for such an application, and the rule of court clearly intimates that his presentation of the petition is to be the *first* step in the proceeding. (*Rule 66.*)

In my opinion Mrs. Whitlock, the mother of the infants whose property is contracted to be sold, was their "next

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friend," within the meaning of the statute, and authorized, without previous appointment by the court, to make the first application, in this matter; and consequently the objection made by the purchaser, to the authority of the special guardian to sell and give title to the premises, is not well taken.

2. By the contract for the sale of the premises, they are to be conveyed *free of incumbrances*. The title of the infants is derived through a deed which conveys the lots subject to a reservation or covenant that five feet of the front thereof shall not be built upon or used, except for steps &c. This is undoubtedly an incumbrance on the lots, restricting the owner in the use thereof, and if not excepted in the contract, nor known to the purchaser when he made it, justifies him in refusing to perform it. (*Maxwell v. East River Bank*, 3 Bosw. 124.)

For this reason the prayer of the petition must be denied. The respondent is entitled to have the contract of sale cancelled, and to be repaid the money which he has advanced on account of the purchase.

[AT CHAMBERS, New York, April 2, 1860. *Bonney*, Justice.]

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65h	302

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A judgment rendered by a justice of the peace, upon the filing of a transcript and the docketing thereof in the county clerk's office, becomes a judgment of the county court; and under section 71 of the code, no action will lie thereon without the leave of that court, first obtained.

Where, in an action in a justice's court, on a judgment recovered before a justice of the peace, which the complaint stated had been docketed in the county clerk's office, the answer insisted that the plaintiff could not maintain an action upon the judgment, for the reason that, "under the provisions of the code no action can be maintained on a judgment of the county court;" it was *held* that the objection that leave of the county court, to bring the action, had not been given, was substantially presented by the answer.

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THIS was an appeal from a judgment of the county court of Orleans county, affirming a judgment rendered by a justice of the peace.

H. R. Selden, for the appellant.

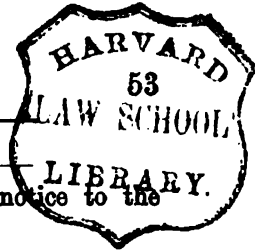
H. J. Thomas, for the respondent.

By the Court, T. R. STRONG, J. This action originated in a justice's court. The complaint sets forth the recovery of a judgment, by the plaintiff, against the defendant, in a court held before a justice of the peace in and for the county of Orleans, the filing of a transcript, and the docketing thereof, in the office of the clerk of said county, and demands judgment for the amount due on the judgment so recovered, with interest. The answer, among other things, insists that "the plaintiff cannot maintain an action upon the judgment set out in the complaint, for this reason—that under the provisions of the code no action can be maintained on a judgment of the county court." On the day to which the trial of the cause was last adjourned, the parties appeared before the justice, and the defendant applied for a further adjournment, which was denied, when the plaintiff proved the judgment on which the action was brought, and the filing of a transcript, and then rested. No evidence was introduced, or question raised, by the defendant, at the trial.

It is now made a point, by the appellant, that the judgment which is the subject of the action, upon the filing and docketing of the transcript, became a judgment of the county court, and therefore that, under section 71 of the code, the action would not lie, without proof that leave had been obtained from the county court to bring the action. That section provides that "no action shall be brought upon a judgment rendered in any court of this state, except a court of a justice of the peace, between the same parties, without

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leave of the court, for good cause shown, on notice to the adverse party," &c.

The respondent insists that this point was not made in the court below, and that the appellant is, for that reason, precluded from making it here. We think the question is substantially presented by the answer. The answer is, in substance, that the judgment set forth in the complaint is a judgment of the county court, and that for that reason, under the provisions of the code, the action would not lie. The only provisions of the code, relating to the subject of actions on judgments, are those contained in section 71 referred to; so much of which as is applicable to this case is above recited. The plaintiff must have understood the answer to mean that, under the first clause of that section, this action on the judgment would not lie, because the judgment was a judgment of the county court. The only obstacle to the action there could be, under that section, taking that view of the judgment, was, that leave of the county court, to bring the action, had not been given, as in that section is required. It was not claimed, in the complaint, that such leave had been obtained, and the answer is obviously pointed, and must have been understood to refer, to that defect in the case. Undoubtedly the objection might have been much more plainly expressed; but it was sufficient if, as we think it did, it called the attention of the plaintiff to the necessity of previous leave of the county court, to warrant the action.

Upon the merits, we are satisfied that the position of the appellant, that the judgment was a judgment of the county court, after the filing and docketing of the transcript, and that by section 71 of the code an action would not lie upon it without leave of the court, is sound. When the judgment was rendered, and the transcript filed and docketed, section 56 of the code of 1848 was in force, and provided that "a justice of the peace on the demand of a party in whose favor he shall have rendered a judgment, shall give a transcript thereof, which may be filed and docketed in the office of the

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clerk of the county where the judgment was rendered. The time of the receipt of the transcript by the clerk shall be noted thereon, and entered in the docket, and from that time the judgment shall have the same effect as a lien, and be enforced in the same manner, as a judgment of the county court," &c. In 1849 the section was amended by striking out that part of the section relating to the effect of the judgment as a lien, and the manner of enforcing it, and substituting therefor the words "shall be a judgment of the county court." (*See section 63 of the present Code.*) This change of phraseology does not, we think, change the substance of the provision, so far as the question in this case is concerned. If the amendment had not been made, the case would be within section 71, and if so, there can be no doubt of the validity of the amendment in reference to this judgment, if otherwise such doubt might be entertained. The new matter must be regarded as law only from the time it was introduced, (*Ely v. Holton*, 15 N. Y. Rep. 595;) but if it is substantially the same as the old matter superseded by it, the power of the legislature to make the change, and that the provision as it stands is applicable to cases of judgments of which transcripts were filed and docketed before the change, as to those which are subsequent, is clear.

Ample provision was made by section 56 of the code of 1848, as by section 73 of the code in its present form, for enforcing justices' judgments, where transcripts were filed and docketed in any county in the state; and every reason which existed for prohibiting actions on judgments of courts of record, without leave, applied to such justices' judgments. No action upon them, except in special cases, could be necessary.

These views require a reversal of the judgment of the county court, and that of the justice.

Judgment accordingly.

[MONROE GENERAL TERM, March 7, 1859. T. R. Strong, Welles and Smith, Justices.]

HARTT and others *vs.* HARVEY and others.

The question as to the qualifications of voters, at an election for trustees of a religious society, arises for decision when the voter offers his vote. If the vote is not challenged, it must be received; if it is challenged, the inspectors must determine the question of qualification. Having received the vote, the inspectors have decided the question, and they cannot afterwards disregard the vote on the ground that it was illegal.

Where the certificate of the inspectors stated that at the election a majority of the votes were cast for one set of persons as trustees, and that the inspectors, as such, declared the apparent result, at the time, but that very soon thereafter satisfactory evidence was produced before them, proving that a part of the votes cast for that set of persons were illegal, and the inspectors then proceeded to certify that another set of persons had a plurality and a majority of the legal votes cast, and were duly elected trustees of the society; *it was held* that the act of the inspectors, in rejecting a part of the votes as illegal, after the same had been received and deposited in the box, was unauthorized; that the certificate showed no right to the office, in the persons to whom it was given; and that the first mentioned set of persons were to be deemed duly elected.

Where a certificate of inspectors confines itself to a bare declaration that the persons to whom it is given are elected, it is *prima facie* evidence of the right of such persons to the office; but where it recites the facts upon which the inspectors rely as their justification and authority for declaring those persons elected, and those facts clearly show that the persons named were not elected, the certificate destroys itself.

An injunction will not be granted in behalf of the legally elected trustees of a religious society, to restrain individuals, having no right to the office, from assuming to act as such. The remedy in such a case is by a suit in the nature of a *quo warranto*.

A court of equity refuses to entertain jurisdiction over corporate elections, because the questions involved are legal ones, and are properly triable in a court of law; and this although a question of fraud in the election be involved.

Although it is not usual, nor proper, as a general rule, to inquire into the right of the court to grant relief, upon an application for an injunction, yet inasmuch as the code requires, as a prerequisite to an injunction, that it shall appear by the complaint that the plaintiff is entitled to the relief demanded, the court will, on a motion to continue a temporary injunction, examine the question as to its power to grant the relief demanded, in the case.

MOTIONS by both parties to continue the temporary injunctions obtained by them, respectively; and by the defendants for a modification of the injunction order procured

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by the plaintiffs. The contest was between two sets of persons, each claiming to be trustees of the society of the Church of the Puritans, in the city of New York.

E. Gilbert and Wm. Curtis Noyes, for the plaintiffs.

E. F. Hall, E. W. Chester and W. M. Evarts, for the defendants.

MULLIN, J. In order to decide the motions made in this cause, an investigation of the merits, to some extent, is necessary, and the facts essential to an understanding of the case are briefly these: In March, 1860, the annual meeting for the election of trustees was held by the religious society located in this city, duly incorporated and known as the society of the Church of the Puritans. The defendants, White and Smith, were duly appointed inspectors of the election, pursuant to the provisions of the general law relating to the incorporation of religious societies. At the election sixty-four votes were received by the inspectors, for persons to fill the vacancies in the office of trustees of said society, which would occur in a few days subsequent to said election. There were nine trustees of the society—divided into three classes of three each, the term of office of one of such classes expiring each year. There were therefore three vacancies to be filled at said election. The plaintiffs were candidates to be voted for to fill said vacancies; and so were the defendants, Harvey and Tompkins, and one Bennett. The ballots of the persons voting were delivered to the inspectors; some of those offering to vote were challenged, on the ground that they were not legal voters at said election, and they were so declared by the said inspectors, and their votes rejected. After the votes were all received they were counted by the inspectors, and sixty-four votes were found in the box. The poll-list kept by the clerk had but sixty-one names upon it. There is said to have been some confusion in the room, and the discrepancy between the

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poll-list and the count may be, and probably is, thus accounted for. After the count, the inspectors declared the result of the election to be : That the plaintiffs had each received thirty-three of the votes, and the defendants, Harvey and Tompkins, had each thirty-one ; and said Bennett had twenty-seven votes, and one Thomas Rondy three votes.

Afterwards, and on the 23d of March, the inspectors executed, under their hands and seals, a certificate, in which they certify and declare that at said election sixty-four votes were cast for trustees, thirty-three of which appeared to be given for Hall, thirty-three for Whiting, and the same number for Hartt ; thirty-one for Harvey, and the like number for Tompkins ; twenty-seven for Bennett, and three for Rondy ; and that they as inspectors declared the apparent result at the time ; but very soon thereafter, and before they had prepared the certificate of election, evidence of a nature entirely conclusive and satisfactory was produced before them, proving that at least six illegal votes were cast, and those votes contained the names of the plaintiffs, and that these were counted as part of the thirty-three votes for them, as above stated. The certificate then proceeds as follows : " We therefore certify that Charles R. Harvey and Charles B. Tompkins have a plurality and a majority of the legal votes cast, and are duly elected trustees of the said society, to serve for three years from the 31st day of March inst. ; that between the said Thomas J. Hall, William E. Whiting, Henry A. Hartt and James D. Bennett, there was a tie vote, and neither of them is duly elected. All which is certified," &c. This certificate was delivered to the defendants Harvey and Tompkins, who still hold it, and by virtue of it they claim to be duly elected trustees of said society for the term of three years.

Before the first meeting of the board of trustees was held, subsequent to such election, the plaintiffs, claiming to be duly elected trustees of said society, applied for and obtained a temporary injunction-order, restraining the defendants, Harvey and Tompkins, from acting, or assuming to act, as trustees

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of said society. The defendants presented to Justice Bonney a petition setting out the matters hereinbefore stated, charging upon the plaintiffs and other of the trustees misconduct, at a meeting of the trustees, held soon after their election, and that it was their intention to prevent the attendance of a quorum at the meetings of the trustees, and thus seriously impair the interests of the society, and praying that the plaintiffs might be enjoined from acting, or assuming to act, as trustees. The injunction, as prayed for, was granted, and served.

The applications now pending before me are to continue these injunctions, and by the defendants, to modify the plaintiffs' injunction, so as to allow one of the defendants to act as trustee, in the event that it shall be necessary to do so, in order to form a quorum for the transaction of business.

Before proceeding to examine the question whether the court has power to issue an injunction-order in favor of either party in this suit, it is proper to inquire which set of claimants is duly elected trustees.

By section three of the general law relating to the incorporation of religious societies, it is provided that on the day of the first election of trustees of any such society, two elders or church-wardens, or if there are no such persons, then two others, selected for the purpose, shall preside at such election, receive the votes of the electors, be the judges of the qualifications of electors, and the officers to return the names of the persons who, by a plurality of votes, shall be elected to serve as trustees, and the returning officers shall immediately thereafter certify, under their hands and seals, the names of the persons elected, &c. By section six it is provided that all subsequent elections shall be held and conducted by the same persons, and in the manner above described, and the result thereof certified by them, and such certificate shall entitle the persons elected to act as trustees. Section seven of the same statute prescribes the qualifications of the voters, and requires the clerk to the trustees to keep a register of the names of such as shall desire to become stated hearers in said church,

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and shall therein note the time when such request was made, and the clerk shall attend all subsequent elections, in order to test the qualifications of such electors, in case the same shall be questioned.

There was no such list kept as is required by section seven, and hence the test of qualification which such a document would furnish is wanting. But it is not claimed that such a list is necessary to the validity of the election, or that the qualifications of voters may not be ascertained by other means. (*The People v. Peck*, 11 *Wend.* 604.) The inspectors are declared to be judges of the qualifications of voters. Their action on that subject is judicial, and can only be reviewed in an action or proceeding instituted to review such determination.

To constitute a person a voter, he must have been a stated attendant on divine worship in the church at least one year before such election, and shall have contributed to the support of said church, according to the customs and usages thereof. If a voter is challenged, on the ground of the absence of some one or more of these qualifications, the inspectors must inquire, ascertain and determine whether the voter possesses them. The question arises for decision when the voter offers his vote. Then the challenge is made, and the voter's right to vote must be determined before it can be received or rejected. If the vote is not challenged, there is no question for decision; the vote must be received. (*Matter of the Chenango County Mutual Insurance Co.*, 19 *Wend.* 635.) If it is challenged, the judge must, in some mode, ascertain and determine the question of qualification. For what purpose? In order that the person challenged may vote, if qualified. When the vote is received, the party has voted—his qualifications are ascertained, and the judge has decided the question. The voter has an interest in the determination; he has a right to be heard, and in many, if not most, cases he is the only person who can speak with certainty as to his qualifications. It cannot be possible that the legislature in-

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tended that these inspectors should receive votes without challenge, or in defiance of a challenge, and after the election is ended enter into an examination of the qualifications of the voters, and count or reject votes as they shall then determine on the question of qualification. How are they, in that stage of the business, to ascertain which of the ballots to withdraw from the box and reject? Inspectors cannot be presumed to know the contents of the ballot. How then are they to separate the legal from the illegal—the votes of those qualified from the votes of those disqualified? The very statement of the proposition that such a power exists excites surprise and alarm. It needs no argument to show how dangerous and how corrupt such a power, in the hands of any class of men, however respectable, would become. The innocent and legal voter, under such a system, is as likely to have his vote rejected as the illegal and fraudulent one. But it cannot be necessary to discuss the proposition. The inspectors, as judges of the qualifications of voters, must decide when the vote is offered, and the decision then made—if in favor of receiving the vote—is final. From the very necessity of the case, a decision cannot be delayed until after the vote is deposited in the box.

The act of the inspectors, in rejecting six of the plaintiffs' votes as illegal, after the same had been received and deposited in the box, was wholly unauthorized, and, so far as that question is involved in these motions, I must assume that the plaintiffs had thirty-three of the sixty-four votes cast, and having a plurality they were therefore elected, unless there is some other reason shown why they were not thus elected.

It is said that the certificate of the inspectors, given to the defendants Harvey and Tompkins, is at least *prima facie* evidence of their right to the office, and conclusive except so far as the courts may, in an action in the nature of a *quo warranto*, try and determine the right to the office without reference to the certificate.

I have no doubt that a certificate under the hands and seals

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of the inspectors, that a person has been duly elected a trustee, is prima facie evidence of his right ; and had the certificate given to the defendants contained nothing but the declaration that the defendants were elected, I should deem myself bound to so regard it. But it recites the facts upon which they rely as their justification and authority for declaring these parties elected, and these facts most clearly show that the defendants Harvey and Tompkins were not elected. When the inspectors admit that sixty-four votes, only, were received by them, and placed in the box, and that of them the plaintiffs had each thirty-three, it is shown to be legally impossible that the defendants Harvey and Tompkins could be legally elected. The certificate destroys itself. While it declares the right, it demonstrates that no such right existed. The statute only provides that the certificate shall entitle the party *electd* to the office. The election lies at the foundation of the right. When there is no election there is no right, and the certificate cannot create it. Much stress was laid, on the argument, upon this certificate ; but so long as it is prima facie evidence, only, of the right, and the right exists to go behind it and inquire into the fact of the election, its importance is not very great. A certificate is not very essential to enable the party elected, to take his office. If inspectors neglect or refuse to give a certificate, the party entitled will be declared entitled to the office. (*The People v. Peck*, 11 *Wend.* 604.)

I must hold, therefore, that upon the certificate, in this case, no right is shown in the defendants, to the office, and, of course, I cannot confer on them the right to a seat in the board of trustees to which they have no color of right by election.

I have not gone into the question of the qualifications of voters, in order to ascertain how the vote would stand, if the votes of legal voters, if any, which have been rejected, had been received, or if illegal votes, if any, received, had been rejected. I have treated the decision of the inspectors as to the qualifications of voters, as conclusive, for the purposes of

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this investigation. It would be exceedingly hazardous to try such a question on affidavits, and it would be improper now to allow to either party the benefit of votes offered, but not received, merely because the person offering the vote proves that he intended to vote for the plaintiffs, or for the defendants. (*In the matter of the Long Island Rail Road Company*, 19 Wend. 37.) The result of the election must be determined by the votes cast. If illegal votes can be ascertained, they may be rejected. But votes not received can never be made available in favor of either party.

If these views are correct, then I must consider the plaintiffs as the legally elected trustees of the church ; and it only remains to inquire whether, if they are so, the court has power to restrain the defendants, who have no right to the office, from assuming to act as such ; or whether, upon any other ground, the plaintiffs are entitled to an injunction against the defendants.

I have already stated the substance of the complaint. The only additional allegations which it seems to me important to refer to are, that the inspectors, and each of them, are charged as follows : that they wrongfully and corruptly designing and intending to evade the law, and also conspiring together to injure and annoy the plaintiffs, and defraud them of their rights and privileges as trustees duly elected by the said society, did illegally and fraudulently, and to the great trouble and damage of the plaintiffs, give and grant to the defendants Harvey and Tompkins, certificates of their election, whereby the said Harvey and Tompkins give out and threaten to act as trustees. The plaintiffs pray judgment that the certificates given to H. & T. be adjudged null and void ; that the defendants be ordered to grant regular certificates of election to the plaintiffs, and for a temporary injunction restraining the defendants H. & T. from acting as trustees, and for \$5000 damages sustained by the plaintiffs in the defendants' granting and receiving the said certificate, and in their, the said

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defendants, Harvey and Tompkins, acting or assuming to act as trustees.

Section 129 of the code of procedure prescribes the cases in which temporary injunctions may be issued. They are : 1. When it appears by the complaint, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission, or continuance, of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff. 2. When, pending the litigation, the defendant threatens or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual. 3. When, during the pendency of an action, the defendant is about to dispose of his property with intent to defraud his creditors.

This case is most clearly not within the third branch of the foregoing section ; nor is it within the second branch. If the defendants, Harvey and Tompkins, should take possession of the office, the judgment in this case would not be rendered ineffectual. When the judgment shall declare that the plaintiffs are entitled to the office, the defendants, if then in office, will be ousted, and the plaintiffs put in. The possession of the office, by the defendants, in the intermediate time, cannot in any manner affect the ultimate rights of the plaintiffs, under the judgment, if they shall obtain any. It is true that in the meantime, while the defendants are kept in, the duties may be discharged by the defendants ; but if there was a quorum without the plaintiffs and defendants, the same result must follow. Hence, when the rights of the plaintiffs are declared, it can have no retro-active effect upon the right or claim to the office. The term of office is running, whether the defendants are in or out of office, and the business of the corporation must, if possible, be carried on, although the right of a portion of the board be doubted, or in dispute.

The right to an injunction, then, rests on the first branch of the section ; and if not given by that, it is not within the

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power of the court to grant it. Under the first clause, the test of the right to the injunction-order is, does it appear by the complaint that the plaintiff is entitled to the relief demanded? The question then is, are the plaintiffs entitled to all or any part of the relief prayed for in the complaint? It cannot be claimed that an injunction, permanent or temporary, is required in aid of that part of the relief which seeks compensation in damages by reason of the wrongful withholding of the certificate, and keeping the plaintiffs out of office. It belongs to a court of law to grant that branch of the relief; and nothing is alleged in the complaint to show that an injunction is either necessary or proper in aid of the plaintiffs, while prosecuting the suit to obtain that part of the relief demanded.

Another part of the relief sought is that the certificate of the defendants may be declared null and void. This calls for an inquiry by the court, into the right of the defendants to the office, and necessarily into the regularity of the election. This question, ordinarily, can only be tried in a proceeding in the nature of a *quo warranto*, which is expressly provided to try the right of a person to an office, into which he may have unlawfully intruded. In that action the people may be the party, and the only party, plaintiff. The claimant of the office, who seeks to be admitted, may be joined as relator, and the occupant of the office, made the defendant; and in such action the right of both the relator and the defendant is determined. This is not an action in the nature of a *quo warranto*, and hence the jurisdiction of the court to grant the relief sought must be found, if at all, under some other head of jurisdiction, but is, as to that part of the relief prayed for, now under consideration, a suit in equity to try and determine the right of the plaintiffs and defendants to the office of trustees of this private corporation.

The chancellor held, in *Mickles v. The Rochester City Bank*, (11 Paige, 118,) that a court of equity cannot interfere to restrain persons claiming to be the rightful trustees of a cor-

poration, from acting as such, on the ground that they have not been duly elected. Neither will a court of equity entertain a bill by shareholders in an incorporated joint stock company, seeking merely to restrain the directors *de facto* from acting as such, on the sole ground of the alleged invalidity of their title to the office. Whether the parties claiming to be directors do or do not lawfully fill that character, depends on a pure question of law—a preliminary question which must be decided, before a court of equity can make any decree. (*Mozley v. Alston*, 1 *Phil. Ch. Rep.* 790. *Doremus v. Dutch Church*, 2 *Green, N. J. Ch. Rep.* 332. *Angell & Ames on Corp.* 407. See 9 *Barb.* 66, 91, 93; *affirmed*, 1 *Kern.* 243; 17 *Ves.* 499; 13 *id.* 509.)

It seems to me that upon these authorities it is impossible to hold that there is any jurisdiction in a court of equity to determine the right to an office, unless the jurisdiction attaches by reason of some considerations in the particular case, by reason of which the court of law cannot furnish adequate relief.

The supreme court has the power, by 2 Revised Statutes, 5th ed. 600, section 5, to inquire into the regularity of corporate elections, and to vacate them, and direct new elections to be held. But religious corporations are expressly excepted from the operation of this statute, and hence, as to the disputed right to an office, must be settled in some other manner.

The only way, therefore, to get rid of officers illegally elected (unless there is jurisdiction in equity) in religious corporations, is by *quo warranto*. But to entitle the people to bring such an action, a mere claim to be an officer is not enough; the defendant must be in possession of the office. (*Angell & Ames on Corp.* § 714.) The defendants, it appears, are not in possession of the office, having been prevented by injunction from taking possession, before there was an opportunity for the performance of an official act. Under these circumstances, it seems to me, the plaintiffs cannot ask relief on the ground

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that the defendants are not in office, when their own act has prevented the defendants from taking it.

The remedy by suit in the nature of a *quo warranto* is the plain and obvious remedy for the plaintiffs. That action is adapted to the case. If required, it may be tried by a jury in a court of law, where legal questions are properly cognizable. The reason given by the courts of equity for not taking jurisdiction of questions of corporate elections, is that the right to the office involves a legal question, and that should be tried and determined at law, before resort is had to equity.

Although the distinction between actions at law and in equity is abolished, yet the inherent distinction between legal and equitable jurisdiction and relief exists, and it is not in the power of constitutions or legal enactments, to abolish it. This natural and necessary distinction is recognized by the constitution, and is provided for by the code, in prescribing different modes of trial for the two classes of actions.

There is but one other ground on which relief in equity, in this case, can be claimed, and that is, the fraud charged on the inspectors, in counting the votes and awarding the certificate. Fraud is one of the most extensive branches of equitable jurisdiction and indeed it may be said that it is the prominent and peculiar head of jurisdiction in courts of equity. But courts of law have had concurrent jurisdiction with those courts in matters of fraud. Owing, however, to the power of courts of equity to shape the relief granted to the necessity of the case in hand, those courts always have been, and always will be, the appropriate tribunals for the trial of those questions.

But, as I have already remarked, a court of equity refuses to entertain jurisdiction over corporate elections, because the questions involved are legal ones, and were properly triable in a court of law. It would seem to follow that, although fraud may be involved in the election, yet that the right being a legal one, and a legal remedy furnished, adapted to the very case, there is no necessity for a resort to courts of equity for relief. Again; if fraud in the inspectors of election will give

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jurisdiction to the equity court, fraud in the voter should have the same effect, and thus almost every contested election would be drawn away from the usual and proper modes of trial for legal actions, and transferred to the courts of equity, which are no more capable of affording relief than the courts of law.

There is still another reason why neither courts of law nor courts of equity should try the right to an office, in an action between individuals. Such a trial does not determine the right; it does not end the litigation. In an action in the nature of a *quo warranto*, the people are the parties plaintiff alone, or with the person claiming the office as relator, against the defendant, the person in office. In such an action, not only is the right of the defendant determined, but that of the relator also. Hence if the defendant is found not entitled, but the relator is, the former is put out and the latter put in; but if neither is entitled, both are ousted, and the office is declared vacant. Every claimant is bound, his rights determined, and a final end put to the litigation. In an action between the claimants for the office, when the people are not a party, the rights of the latter are not affected; the judgment does not bind them; and they are therefore at liberty to litigate the whole question again, to the great annoyance and expense of parties, and making unnecessary labor for the court.

I will not say that in no case may a court of equity entertain jurisdiction between individuals, to try the right to an office. Circumstances may be supposed when, by the act of the claimants of the office holding the evidence of the right to it, but not in fact entitled, the proceeding by *quo warranto* or *mandamus* could not be instituted, and yet the other party claiming title to the office cannot get into possession. In such a case, to prevent a failure of justice, a court of equity would assume jurisdiction and determine the right.

No such necessity is shown or alleged in this case, and hence I must hold that this court, as a court of equity, has not power to grant the plaintiffs the relief demanded, and

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therefore I cannot continue the injunction. I have already said that if the plaintiffs are entitled to damages the continuance of the injunction is not necessary to the protection of their right in reference to that relief.

I am aware it is not usual, nor, ordinarily, is it proper, to inquire into the right of the court to grant relief, upon an application for an injunction; still less to refuse an injunction when the question of jurisdiction is doubtful and when refusing it may produce injury to the party applying. But the code requires, as prerequisites to the injunction, that it shall appear by the complaint that the party is entitled to the relief demanded. This involves the question of the power of the court to grant relief in the case; and as I have no doubt but that the court, as a court of equity, has not power to grant the relief demanded in this case, I must deny the plaintiffs' motion for a continuance of the injunction.

The motion of the defendants is also denied, without costs to either party.

[NEW YORK SPECIAL TERM, May 7, 1880. *Mullin*, Justice.]

BALLARD & HENDERSON vs. FULLER.

Where the defendant obtained \$8300 from the plaintiffs, upon three checks drawn by him, two of which were upon a bank at Rahway, N. J., and the other upon a bank in the city of New York, representing, at the time, that the two former checks were good, and that he was authorized to draw for \$40,000; that he had the money in bank, and that he was good for the amount of those checks, himself; and it appeared, upon a motion to discharge an order of arrest, that two days before the defendant obtained the money on the checks, his notes, to the amount of \$8000, were protested, and that attachments were soon after issued thereon, and the notes still remained unpaid; that he was insolvent at the time, and knew it; that he had no funds in the bank at R.; and had only been *allowed* to overdraw his account, and the bank declined to honor the checks; that he made other cotemporaneous attempts to obtain goods on credit, from other persons, upon like representations; and that he failed, two days after obtaining the money on the checks; the defendant not positively alleging, on the motion, that he believed himself to be solvent when he obtained the money; *Held* that a

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prima facie case of fraudulent intent was established, in respect to all the checks ; and the order refusing to discharge the order of arrest was affirmed. On a motion to vacate an order of arrest, evidence of other concurrent frauds, committed by the defendant, is admissible, as proof of his intent in committing the particular fraud charged.

A PPEAL from an order made at a special term, denying a motion to vacate an order of arrest.

H. Sheldon, for the plaintiffs.

G. Dean and *Charles E. Whitehead*, for the defendant.

By the Court, LEONARD, J. The action is for the recovery of \$3300, on three checks, two of which are drawn upon a bank at Rahway, N. J. and the other upon a bank in the city of New York ; the latter check being post dated one day. The checks were all negotiated in this city. The affidavit, on which the order of arrest was granted, shows that the checks on the bank at Rahway were drawn by the defendant without any funds to meet them, although he represented that they were good, and that he was authorized to draw for \$40,000. The affidavit also states that the defendant failed two days afterwards, and avowed himself unable to pay the checks ; and that the debt was fraudulently contracted.

The defendant denies that he made this representation at the time he obtained the money ; states that he was *authorized* to overdraw on the bank at Rahway to the amount of \$15,000, which sum he had secured to the bank by a mortgage previously executed to secure discounts and overdrafts ; that his line of accommodation at this bank, under the said arrangement, including the two checks, was not full ; that he believed, when he obtained the money from the plaintiffs, that he could go on in business and pay his debts ; that he realized the impossibility of doing so upon learning that a creditor was about prosecuting an attachment against his property, as a non-resident debtor. The defendant also introduces the affidavit of

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the president of the bank at Rahway, who says the defendant was *allowed* to overdraw his account; that on the 21st of June, which was the day before his failure became public, and the same day that the defendant obtained part of the money from the plaintiffs, the bank learned that the defendant was embarrassed in business, and declined to honor the checks in suit.

In reply, the plaintiff Henderson, who made the first affidavit on which the order of arrest was granted, reiterated his former statement; and he is further sustained by Mr. Maurice, who states that he was present when the defendant obtained the money on these checks, and heard him represent to the plaintiff Henderson, that he had the money in the bank at Rahway, and that the checks were good; also that he, the defendant, *was good for the amount of the checks*, himself.

The plaintiffs also showed, by affidavit, that two days before the defendant obtained the money on the checks, his notes, to the amount of \$6000, had been protested, and still remained unpaid; that the defendant was insolvent at the time he obtained the plaintiffs' money, and unable to pay his debts, and that he well knew it.

The plaintiffs also read affidavits showing other cotemporaneous attempts by the defendant to obtain large amounts of goods on credit from other parties, upon like representations of his responsibility.

The defendant objected, at the hearing of the motion at special term, to the reading of any affidavits showing other grounds of arrest than those contained in the affidavit upon which the order of arrest was founded.

The defendant also insists that no facts establishing fraud were alleged in the affidavit upon which the arrest was granted, in respect to the check on the bank in this city, and that this check, as to which no fraud is shown, being embraced in the action, the order of arrest must be vacated.

There were some other statements contained in the affidavits, read on behalf of the plaintiffs to resist the motion, to

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which I have not adverted, as they came within the defendant's first objection, or were irrelevant or inadmissible as grounds for sustaining this arrest.

I do not think the decision of Justice Allen, reported in 12 *How. Pr. Rep.* 197, is an authority in point for excluding any of the foregoing facts which were before the court at special term, in answer to the defendant's motion. Evidence of other concurrent frauds has long been admitted by the courts, as proof of the intent in committing the particular fraud charged; and this practice has been sanctioned by a recent decision of the court of appeals. (18 *N. Y. Rep.* 588.)

Two grounds for the arrest are disclosed in the affidavit on which it was granted, viz. 1st. The defendant's representations, affecting the two checks on the Rahway Bank. 2d. The failure of the defendant occurring in two days after obtaining the money, and his avowed inability to pay the plaintiffs' demands, showing a probable intent to defraud the plaintiffs, and affecting the whole transaction upon the three checks; and in connection with the fact that the defendant had no funds to meet the checks upon the Rahway Bank, establishing a *prima facie* case of fraud in obtaining the money on the check, drawn upon the bank in this city.

It is satisfactorily established that the defendant represented the checks on the Rahway Bank to be good, and that he had the funds in bank to meet them. The weight of evidence sustains the allegation that this representation was in fact made, at the time the money was obtained.

The alleged authority to overdraw his account does not excuse the defendant. From the statement of the president of the bank there appears not to have been an authority to overdraw, but a *permission*, only, which the bank had a right to withdraw at pleasure, and which was in fact withdrawn at a time when the full amount of the contemplated accommodation had not been used. It was not an agreement which the defendant could enforce against the bank, and is not a right which he can assign to the plaintiffs or to his general

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assignee, or upon which he could maintain an action for damages, so far as is shown by the affidavits. It in no manner warranted the defendant in making the statement to the plaintiffs that the checks were good, or that he had funds to meet them, upon which they parted with their money.

The defendant's conduct becomes more inexcusable when we advert to the fact that \$6000 of his paper was under protest, at the moment when he obtained the money on these checks, and represented himself to be good. The concealment of such a fact is strong evidence of a fraudulent intent; but when accompanied by an assertion that he was pecuniarily good, followed by attachments on these very demands under protest, (as I infer from the defendant's statement of his reason for abandoning the intention of going on with his business so soon after obtaining the plaintiffs' money,) I think there can be no doubt of his fraudulent intent in respect to the check on the bank in this city, as well as the two other checks.

The fact of the protested paper was germane to the original charge that the defendant had become publicly insolvent two days after obtaining the money on the three checks in suit. It was not a charge of a new fraud, but was corroborating evidence of the fraudulent intent already charged. It was evidently known to the defendant; for he discloses that he was threatened with attachments. He should have adverted to the fact, and explained it, if it was capable of an explanation consistent with a fair intent in relation to the question to be considered on the motion. He should have anticipated the disclosure, at the hearing, of so important a fact, and have been prepared to meet it in advance.

It is also to be observed that the defendant nowhere alleges that he believed himself to be solvent when he obtained the money, except in the modified manner that he expected to go on in business and believed that he would be able to do so, and that he did not expect to fail when he did. He discloses facts that warranted the belief that he knew he was insolvent, but was resolved to go on, without a public failure, and pay

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as long as he could. He in fact pursued this course until his creditors were about procuring attachments against him as a non-resident debtor, when the impossibility of satisfying these creditors compelled him publicly to acknowledge his insolvency.

The order appealed from must be affirmed with \$10 costs of the appeal, to the plaintiffs.

[NEW YORK GENERAL TERM, May 7, 1860. *Sutherland, Bonney and Leonard, Justices.*]

GREENE, executor &c. vs. BRECK and others.

The mere insolvency of a special partnership does not, of itself, work such a legal or equitable appropriation or distribution of its effects to, or among, all its creditors ratably, as to deprive a particular judgment creditor of his right to issue an execution, and to seize, and sell, and make his debt out of those effects; or to prevent any individual creditor who has no judgment, from commencing an action in his own name and right alone, and obtaining a judgment for his debt.

Nor will such insolvency deprive a judgment creditor of his right, by action, to remove a fraudulent obstruction, and enforce the payment of his judgment, in the absence of any action or proceeding on the part of other creditors, for a pro rata distribution or application.

APPEAL from an order made at a special term, dismissing the complaint. The action was brought by the plaintiff, suing alone, as executor, for the purpose of setting aside an assignment for the benefit of creditors, made by a special partnership. (*See the case at special term, reported 10 Abb. 42.*)

By the Court, SUTHERLAND, J. I am not aware that it has ever been held, or supposed, that the mere insolvency of a partnership, of itself, worked such a legal or equitable appropriation or distribution of its effects, to, or among all its creditors ratably, as to deprive a particular judgment creditor of his right to issue an execution, and to seize, and sell, and make his debt out of those effects; or prevent any particular

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or individual creditor, who had no judgment, from commencing an action in his own name and right alone, and obtaining a judgment for his debt. And in the absence of any express legislative declaration to that effect, either in the statute regulating special partnerships, or by general law; and in the absence of any statute or law declaring or defining what act or acts or circumstances, shall constitute, or be evidence of bankruptcy or insolvency, I do not see how the mere declaration or admission of insolvency as defined and understood by our courts, could be held or supposed to work such effects.

The statute relating to special partnerships does not attempt to regulate or limit the rights of creditors, as against them; but it undertakes to regulate and limit the rights and power of the partners over the partnership property, and to regulate the rights of all the creditors in an action or proceeding when all the creditors are parties.

I find nothing in the statute, or in the cases cited, declaring or showing that the mere insolvency of the firm deprives a judgment creditor of his right, by action, to remove a fraudulent obstruction, and enforce the payment of his judgment, in the absence of any action or proceeding on the part of other creditors for a pro rata distribution or application.

It certainly does not follow, because a special partnership cannot give a voluntary preference, that a creditor cannot obtain a preference by a hostile proceeding, and against the will of the partnership.

The cases of *Innes v. Lansing*, (7 Paige, 583,) *White-wright v. Stimpson*, (2 Barb. S. C. B. 379,) and other cases cited, in my opinion, sustain no such proposition.

If, however, the insolvency gives all the creditors a right to a pro rata distribution or application of the partnership effects, the enforcement of such right implies an action or proceeding by or in behalf of such creditors. In the absence of any such action or proceeding, I do not see why any particular or individual creditor has not a right to enforce the payment of his debt.

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It appears to me that the plaintiff in this case had a right to attack the assignment, and get his debt if he could. If the plaintiff should be held to be entitled to his pro rata share only, the action might have proceeded, and the decree in it provide for bringing in other parties.

In my opinion, the order of the special term dismissing the complaint in this action, should be reversed, with costs.

[NEW YORK GENERAL TERM, May 7, 1860. *Sutherland, Bonney and Mullin*, Justices.]

BUTLER and another vs. LEE and another.

The supreme court has no power, in an action upon a draft or bill of exchange, to order the draft to be annexed to a commission issued to take the examination of witnesses for the defendant, residing in another state.

THIS was an appeal from so much of an order made at a special term, by Justice DAVIES, as required the original draft or bill of exchange on which the action was brought, to be annexed to the commission issued to examine certain witnesses in Iowa for the defendants; the draft or bill of exchange to be delivered by the plaintiffs or their attorney to the clerk of this court, for that purpose, who should, before annexing the draft to the commission, cause a *photograph* of said draft to be taken, at the expense of the defendants, to be allowed them as disbursements in the action in case of their recovery.

The defense set up in the answer was, that the draft was in fact drawn for \$10, and was afterwards altered without the defendants' knowledge or consent to \$100.

Miller, Peet & Nichols, for the plaintiffs.

A. K. Hadley, for the defendants.

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By the Court, SUTHERLAND, J. We think that part of the order at special term, appealed from, should be reversed with ten dollars costs. We find neither precedent or principle authorizing that part of the order. (19 *N. Y. Rep.* 9. 1 *Duer*, 652. 1 *Kern*. 575. 3 *R. S.* 293.) The code (§ 388) and the revised statutes have prescribed a mode in which the defendants and their witnesses can have an inspection of the draft, if necessary, here and within the jurisdiction of this court; but we see no *power* in the court to compel the plaintiffs to part with their property (the draft) in the manner and for the purposes contemplated by this order.

Order reversed.

[NEW YORK GENERAL TERM, May 7, 1860. *Sutherland, Bonney and Leonard*, Justices.]

SEIZER vs. MALL and JEWELL.

Where a complaint alleged that the defendants, officers of a corporation, wrongfully and fraudulently issued false certificates of stock, beyond the chartered power or right of the corporation; that subsequently a parcel of such false certificates, purporting to represent 3000 shares of genuine stock, came into the hands of the plaintiff, by purchase, not from the defendants, but from third parties, who had taken them, either directly or remotely, from the defendants; *Held*, on demurrer, that the complaint showed no cause of action on the part of the plaintiff, against the defendants; there being no privity between the parties, and the plaintiff having his remedy against the parties from whom he purchased the false certificates.

A PPEAL from an order made at a special term, overruling demurrers to the complaint.

John M. Van Cott, for the appellants.

S. W. and R. B. Roosevelt, for the respondent.

By the Court, SUTHERLAND, J. The defendants severally demurred to the plaintiff's complaint in this action, on the ground, among others, that it does not state facts sufficient to

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constitute a cause of action. The demurrers were overruled by the special term, with costs. From these orders overruling the demurrers the defendants have appealed to the general term.

The complaint substantially states that "The Parker Vein Coal Company," a foreign corporation, by its act of incorporation had a capital stock of three millions of dollars, divided into shares of \$100 each, and prior to April, 1854, had issued certificates of stock for such shares to the full extent of its capital, which certificates were outstanding and valid; that afterwards the defendants, as president and vice president of the corporation, issued and sold stock beyond the authorized capital; and that the plaintiff afterwards bought from parties (not named in the complaint) 3000 shares of such over-issued stock, believing it to be genuine; but that it is void in law and of no value; wherefore the plaintiff claims that the defendants are liable to *him* for the price paid therefor, with interest.

The complaint alleges that the defendants, by the issue and sale of such spurious certificates of stock, held out the false pretense that the purchasers thereof would obtain thereby the rights and privileges of stockholders in said corporation; but the complaint does not allege that the defendants, or either of them, issued or transferred the 3000 spurious shares or any part thereof, or any spurious certificates, directly to the plaintiff. There is an allegation in the complaint, that the plaintiff, at various times during the months of April and May, 1854, bought certificates, in the aggregate, for 3000 shares of stock, paying therefor \$19,250, supposing them to be genuine; but it is not alleged or pretended in the complaint, that the plaintiff bought these certificates, or any of them, of the defendants.

There is an allegation in the complaint, that the plaintiff was induced to pay the sum aforesaid, by the fraudulent acts and false pretenses of the defendants; but there is no allegation that the false pretenses were made by the defendants to

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the plaintiff ; or that the fraudulent acts consisted in a transfer of the spurious certificates from the defendants to the plaintiff. The allegation in the complaint is, that the spurious certificates were thrown into the market by the defendants, and that the plaintiff was induced to pay the sum aforesaid by the fraudulent acts and false pretenses of the defendants.

The substance and theory of the complaint plainly is, that the defendants, officers of the corporation, wrongfully and fraudulently issued false certificates of stock beyond the chartered power or right of the corporation ; that in the course of time, a parcel of these false certificates, purporting to represent 3000 shares of genuine stock, came into the hands of the plaintiff by purchase, not from the defendants, but from third parties, who had taken them, either directly or remotely, from the defendants.

The question is, whether the complaint shows any cause of action on the part of the plaintiff against the defendants ? I think it does not. There is no privity between the plaintiff and the defendants. The plaintiff has his remedy against the party or parties of whom he purchased the pretended stock, or false certificates for pretended stock. (*Kendall v. Stone*, 1 Sel. 14. *Gompertz v. Bartlett*, 75 Eng. C. L. R. 849. *Kempson v. Saunders*, 4 Bing. R. 5. *Nockels v. Crosby*, 3 Barn. & Cress. 814.) The party or parties to whom the defendants directly issued the false certificates, has or have his or their remedy against the defendants ; but the plaintiff has no remedy against the defendants, on the facts stated in the complaint. On these facts it must be presumed, that the *defendants* intended to injure and did injure the party or parties to whom they directly issued or transferred the certificates.

The plaintiff's case is not within the principle of the decision in *Thomas v. Winchester*, (2 Sel. 397 ;) but it is, I think, within the principle of the decisions in *Mechanics' Bank v. The New York and New Haven Rail Road Co.*, (3 Kernan, 599 ;) *Farmers' and Mechanics' Bank of Kent Co. v. Butch-*

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ers' and Drovers' Bank, (16 N. Y. R. 125 ;) and *Zabriskie v. Smith*, (3 Kernan, 330.)

The order of the special term, overruling the defendants' demurrers, should be reversed, with \$10 costs ; and the defendants should severally have judgment on their demurrers, with costs.

[NEW YORK GENERAL TERM, May 7, 1860. *Sutherland, Bonney and Leonard*, Justices.]

In the matter of the petition of DANIEL BUHLER.

The proper construction of the first section of the act in relation to frauds in assessments for local improvements in the city of New York, passed in 1858, which provides that if, in the proceedings relative to any assessment for the purpose mentioned, or in the proceedings to collect the same, any fraud or legal irregularity shall be alleged to have been committed, the party aggrieved may apply to any judge of the supreme court for relief, &c., is, that the words "proceedings relative to any assessment," therein mentioned, are not to be extended beyond the initiatory steps to order the doing of the work for which the assessment is to be made. The changing of the grade in streets is not necessarily a proceeding relative to an assessment for paving.

Accordingly *held* that the section did not apply to the case of an assessment regularly made for paving a street, which assessment was rendered necessary in consequence of an ordinance of the common council, passed subsequently to the opening of the street, changing the grade of the street, and thus requiring the grades of the adjoining streets to be altered, to correspond therewith.

The want of the written consent of two thirds of the owners of property to a change of the grade of a street as required by the act of 1852 is not a sufficient cause, within the provisions of the act of 1858, for vacating an assessment made for paving streets after the new grade was adopted.

PETITION to the court for an order vacating an assessment made by the direction of the common council, for paving the New Bowery in the city of New York. The facts appear in the opinion of the court.

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INGRAHAM, J. Proceedings in this matter were commenced before me, some time since, and the evidence taken therein shows that after the opening of the street the common council ordered the grades to be changed; that in consequence thereof the grades of the adjoining streets had to be altered, to correspond therewith, and the assessment here complained of was for this work. The ground upon which the petitioner rests this application is, that the ordinance to change the grades was passed in violation of the provisions of the act of 1852, which prohibited any change of the grades of streets without the consent of two thirds of the owners of the land fronting thereon.

No fraud or irregularity is alleged to have been committed, in passing the ordinance for the assessment, or in the proceedings to collect the same; and this question is now submitted to me, viz.: whether the want of the written consent of two thirds of the owners of property, to change the grade of the streets, is a sufficient cause, within the provisions of the act in relation to frauds in assessments for local improvements in New York, passed in 1858, (*Laws of 1858, p. 574.*) to vacate the assessment for paving the streets after such grade was adopted? The words of the statute are as follows: "If in the proceeding relative to any assessment or assessments for local improvements in the city of New York, or in the proceedings to collect the same, any fraud or legal irregularity shall be alleged to have been committed, the party aggrieved may apply," &c.

The statute applies to two cases: 1. Where the fraud or irregularity is committed in the proceedings relative to the assessment. 2. Where the fraud or irregularity is committed in the proceedings to collect the assessment.

No fraud or irregularity is charged as to the second ground—the collection of the assessment. The decision of this question, therefore, depends on the construction given to the term "the proceedings relative to the assessment." This has heretofore been construed as applying to the laying of the

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assessment, the passage of the ordinance therefor, and the resolution directing the work to be done for which the assessment was laid. In all such cases, where fraud or irregularity has been shown, we have in several instances, vacated such assessments.

The proceeding now objected to does not come within either of these cases. The petitioner contends that although it is not within these cases, still that the work would not have been required if the law of 1852 had been complied with in regard to the change of the grades, and that it was therefore irregular to order the pavement to be relaid. I am of the opinion that the act will not bear such a construction. Although the statute may be considered a remedial one, and is beneficial in its operation, in giving the owners of property relief against illegal assessments, which before its passage, could only be obtained through the tedious and hazardous process of submitting to a sale for the assessment, and the contesting its legality in an action to recover the possession after such sale had been confirmed, still it is not to be extended, by inference, beyond the fair interpretation of the words used in defining the cases in which the law may be resorted to.

The proceedings relative to an assessment cannot, by any fair interpretation, be extended beyond the initiatory proceedings to order the doing of the work for which the assessment is to be made. The changing of the grade in the New Bowery and adjacent streets was not necessarily a proceeding relative to the assessment for paving. No objection appears to have been made thereto. If any party objected to it, ample remedies existed, by which such change could have been prevented, long before any measures were taken to order the work to be done for which such assessment was to be laid. The case suggested by the counsel, on the argument, of irregularity in the opening or widening of a street, shows more forcibly the impropriety of connecting the original improvement with the subsequent ordinances for grading or paving it. The opening has nothing to do with the proceedings to regulate

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or grade, and yet the irregularity in opening would be as good a ground for setting aside an assessment for paving, as the irregularity in the change of the grade would be to vacate an assessment for paving after such grade had been changed.

The title of the act shows the intent of the legislature to have been to confine it to the proceedings by which the assessment was immediately ordered.

It was urged on behalf of the petitioner that if the original change of grade was void, the subsequent proceedings to pave the streets according to it were illegal, and therefore came within the provisions of the statute. I am at a loss to see on what grounds the change of grades can be declared void. The common council had authority to make such change, but were directed, before doing so, to have the written consent of a portion of the owners. If they acted without consent, they might have been restrained from carrying out such change, or perhaps those who were injured might have an action for damages therefor; but after they have permitted such change to be made and completed without objection, it is too late to allege the whole proceeding to be irregular. If they can resort to such an irregularity in the original proceeding for changing the grade, to relieve them from the expense of paving, the objection will continue through all time, whenever it shall become necessary to repair the side-walks, or curb or do any work on the street, which could be the subject of an assessment. Such never could have been the intent of the statute. The proper construction of it must be limited to the resolution providing for doing the work to be paid for by the assessment, the laying of the assessment, and the proceedings to collect the same, and cannot be extended to previous matters which did not render an assessment necessary and were not immediately connected therewith.

If the common council should pass a law or order an improvement, for which they had no authority, and the whole proceeding was absolutely void and without jurisdiction, all subsequent legislation founded on such void act must also be

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irregular and void. In such a case I suppose this act may be resorted to for relief against any assessment so imposed, on the ground of irregularity in ordering the work to be done; but a mere irregularity in such previous proceeding cannot be resorted to, when the subsequent proceedings are free from any other objection.

If the petitioner desires to be heard on the question whether the resolution to change the grade is absolutely void, he can give a notice therefor. If no notice is given, the application is denied.

[NEW YORK SPECIAL TERM, November 7, 1859. *Ingraham*, Justice.]

 MCGOVERN vs. PAYN.

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An action—the leading object of which is to recover damages for the injuries and losses the plaintiff has sustained by the fraud of the defendant, which fraud consists in the defendant's falsely and fraudulently pretending to have been the owner of land in Iowa, which he induced the plaintiff to take in exchange for a lot of land in C. in this state, worth \$2000, whereby he lost that amount of money; and also the further sum of \$300 expenses incurred in removing himself and family to Iowa on a fruitless journey to take possession of that land, and in returning to C.; and the further sum of \$500 for losses, sufferings and hardships consequent upon such journey, and for sacrificing a remunerative employment at home—is not an action upon *contract*, but is a special action on the case, to recover damages for a fraud.

Such a case is not within the 4th subdivision of section 179 of the code, inasmuch as it cannot be said to be a suit to enforce a liability for a *debt* fraudulently contracted, or an *obligation* fraudulently incurred. Consequently the defendant cannot be arrested and held to bail, in an action of that nature.

That section of the code obviously contemplates that the debt or obligation shall be of that character that a suit might be brought on it, even if unaccompanied by fraud in contracting or incurring it, although in the latter case an order of arrest could not be obtained. In other words, that fraud is not the gist of the cause of action, though it is of the order of arrest. *Per HOGESBOM, J.*

The case of *Crandall v. Bryan*, (15 *How. Pr. Rep.* 48,) disapproved.

Where an order of arrest covers causes of action for which the defendant is not liable to arrest, it should be vacated and set aside.

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Counts in a complaint, of a character not such as to justify an order of arrest, will, if coupled with a count under which an order can properly be obtained, necessarily vitiate an order of arrest granted upon the whole complaint.

APPEAL from an order made at a special term denying a motion to vacate an order of arrest. The order of arrest was originally granted upon the ground that the defendant had fraudulently contracted the debt or incurred the obligation for which the action was brought. The motion to vacate the same was upon the ground that the fraud was not, on the whole case, established, and did not in fact exist. The motion was heard at the Albany special term in May, 1859, before Justice HOGEBOM, who denied the same upon the merits, and intimated that some of the causes of action set forth in the complaint were not such as to justify an order of arrest. But he retained the order upon the ground that the first count in the complaint might be regarded as a cause of action upon contract. From this order the defendant appealed to the general term. The other material facts are stated in the opinion of the court.

H. N. Wright, for the appellant.

Theo. Miller, for the respondent.

By the Court, HOGEBOM, J. There is some difficulty in determining, from the complaint, what is the precise character of the causes of action therein set forth—a question nevertheless of considerable importance in determining the validity of the order of arrest.

The leading object of the suit seems to be to recover damages for the injuries and losses the plaintiff has sustained by the fraud of the defendant. This fraud, as alleged, consists in the defendant's falsely and fraudulently pretending to have been the owner of a tract of land in Iowa, which he induced the plaintiff to take in exchange for a lot of land in the town

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of Chatham, in the county of Columbia, worth two thousand dollars, whereby he lost that amount of money ; and also the further sum of three hundred dollars, expenses incurred in removing himself and family to Iowa on a fruitless journey to take possession of that land, and in returning to Chatham ; and also the further sum of five hundred dollars for time spent, hardships endured, injuries caused, diseases contracted, medical expenses incurred, and loss of employment sustained by removing to Iowa, and by surrendering, and on his return being unable to regain, the situation of night watchman on the Western Rail Road, which he held at Chatham before removing to Iowa. These three several sums the plaintiff, according to his demand of judgment, seeks to recover in this action, and the facts supposed to justify such recovery are set forth in three separate counts or divisions of the complaint.

The first count alleges, though with unnecessary prolixity and excessive repetition, that on the 30th day of January, 1858, the plaintiff was the owner of certain premises in Chatham (describing the same) of the value of \$2000 ; that the defendant, intending to deceive and defraud the plaintiff, falsely and fraudulently represented to him, and induced him to believe, that he was the owner of two hundred acres of land in Iowa, (describing the same,) of the value of \$2000 ; that with like purpose to defraud the plaintiff, he proposed an exchange of said parcels of land, the one for the other ; that the plaintiff, confiding in such representations and deceived thereby, agreed to make the exchange ; that thereupon it was mutually agreed that conveyances should be made therefor from the one party to the other, respectively—which was accordingly done—the one conveyance being the consideration of the other, although the consideration expressed therein is the sum of \$2000 ; that the defendant, at the time aforesaid, was not in fact the owner of said lands in Iowa, and had no title thereto, all of which he well knew ; whereby the defendant cheated and defrauded the plaintiff out of his said lands at Chatham, which were, on said 30th day of January, 1858, of the value

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of \$2000 ; and which said sum of \$2000 the said plaintiff, by reason of the premises above set forth, claims and demands of the defendant, with interest from the said 30th day of January, 1858.

The second count alleges that the plaintiff, after receiving the defendant's deed of the Iowa lands, and in full confidence that he thereby became the owner thereof, removed himself and his family, and a large quantity of personal property, to the state of Iowa for the purpose of occupying and cultivating said lands as a farm and homestead for himself and family ; that he found the said lands, but then for the first time ascertained that the defendant was not the owner thereof and had never had any title thereto ; that the plaintiff, in removing himself and his family and personal property to Iowa, and in returning therefrom to Chatham, necessarily expended the sum of \$300 ; and he claims and demands of the defendant the said sum of \$300, and interest thereon from the 16th day of June, 1858, being the day of his arrival at Chatham on his return from Iowa.

The third count claims and demands of the defendant the further sum of \$500 for the time of the plaintiff and family in making said journey to Iowa for the purpose aforesaid, and for the hardships necessarily by them thereby endured, and for the injury caused thereby to himself and family, and the diseases thereby contracted by them, and the expenses and charges for medicine and medical attendance necessarily thereby incurred ; and for the loss of employment sustained by the plaintiff in removing from Chatham to Iowa, he having been just previously engaged by the Western Rail Road as a night watchman, at the rate of \$20 per month, which employment the plaintiff relinquished for the purpose of such removal to Iowa, and has not since been able to regain his former situation, or to procure much employment in any capacity. " And the said plaintiff alleges (so this count closes) that by reason of the premises last aforesaid, he has sustained damages to the amount of five hundred dollars, or thereabouts."

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There seems very little doubt that the pleader who framed this complaint intended by it a special action on the case, seeking to recover damages for a fraud perpetrated by the defendant upon the plaintiff. The charges of fraud are reiterated over and over again in the course of the complaint. There is nothing in it that looks like an action upon contract, either express or implied, except the conclusion of the first count, which claims to recover \$2000 and interest, being the alleged value of the plaintiff's land, of which land he claims to have been defrauded by the act of the defendant. Upon the theory that this was an action upon contract, all these allegations of fraud were out of place, as not material to the plaintiff's recovery, and would, I think, have been struck out as irrelevant and redundant, (*Humphrey v. Brown*, 17 *How. Pr. Rep.* 485,) even though there had been an intention to procure an order of arrest; for where the right to the order depends upon facts extrinsic to the cause of action, and which are not identical with or inherent in the cause of action itself, they should not be incorporated in the complaint, but be stated in the affidavits or other papers relied upon to justify an order of arrest. I am inclined, therefore, to think that, after all, the first count wears more the semblance of a count in tort to recover damages for a fraud, than a count on contract, to recover the value of land, conveyed to the defendant upon a consideration which has wholly failed.

The second count is still less like a cause of action upon contract. Adopting for its foundation most of the allegations contained in the first count, it seeks to recover the expenses of the journey to Iowa, not because the defendant has promised to pay them, not because they are damages necessarily or naturally flowing from a breach of contract express or implied, but because they are damages sustained in consequence of the fraud perpetrated by the defendant upon the plaintiff. I cannot therefore regard this count as sounding in contract.

The third count wears still less such an appearance. It seeks to recover damages of different kinds resulting from the

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fraud of the defendant—from his fraudulent representations of his ownership and title to lands in Iowa, by which the plaintiff was induced to take a title thereto, to make a journey to Iowa, to spend the time necessary for that purpose, to encounter hardships, contract diseases, incur medical expenses, and sacrifice a remunerative employment at home, resulting altogether in damages to a large amount. These are not the damages ordinarily resulting from a breach of contract; and there is no contract set forth in the complaint as the foundation or origin thereof.

If we should therefore conclude that the first count was upon contract, it is connected in the same complaint with two other counts sounding in tort. We must therefore examine, first, whether the last two counts, assuming them to be in tort, are of a character which, under the code, justify an order of arrest; and if not, whether they do not, though coupled with a count under which an order of arrest could have been properly obtained, necessarily vitiate an order granted upon the whole complaint, and not upon the first count alone.

Prior to the non-imprisonment act of 1831, the general if not universal rule was that parties were liable to imprisonment in civil actions. (*King v. Kirby*, 28 Barb. 52.) After the passage of that act, such may perhaps have still been regarded as the general rule in actions for torts, though the contrary one applied to contracts. But since the code the liability to arrest depends exclusively upon its provisions and the provisions of the act of 1831. The general rule must be regarded as being that a party is not subject to imprisonment in a civil action, and the plaintiff seeking to imprison his adversary, must either in his complaint or in the papers upon which an order of arrest is applied for, show himself expressly within the provisions of the law. All these, except those relating to imprisonment for contempts and imprisonment under the act of 1831, are contained in section 179. They by no means embrace *all cases* of torts or wrongs. The present case, if coming within the section at all, is embraced under the 4th

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subdivision, which is as follows: "Where the defendant has been guilty of a fraud, in contracting the debt or incurring the obligation, for which the action is brought, or in concealing or disposing of the property, for the taking, detention or conversion of which the action is brought." The latter clause has obviously no application to the present case; and the question therefore is, whether this can be said to be a suit to enforce a liability for a debt contracted, or an obligation incurred. I am unable to regard it in that light. The fraud or the damages arising from it is not the debt or obligation "for which the action is brought." The word *debt* obviously implies a liability arising upon contract; and the word "obligation," in this connection, has, I think, the same meaning. They both import a contract liability. Debt implies a fixed and absolute liability—a sum actually owing from one party to another. Obligation will include an inchoate and conditional liability whose fixed character is to be determined by subsequent events. The section obviously contemplates that the debt or obligation is of that character that a suit might be brought on it, even if unaccompanied by fraud in contracting or incurring it; although in the latter case an order of arrest could not be obtained. In other words, that fraud is not the gist of the cause of action, though it is of the order of arrest. This construction is fortified by a reference to the 4th subdivision of the 4th section of the act to abolish imprisonment for debt, (*Laws of 1831, chap. 300,*) of which it is almost a literal transcript, and from which it was undoubtedly borrowed. That, and the preceding sections of the non-imprisonment act, relate exclusively to actions for the enforcement of *contracts*; the law as to imprisonment for *torts* being left unchanged. I cannot, therefore, agree to the construction which has been put upon this section by Mr. Justice Smith of the 7th district, in *Crandall v. Bryan*, 15 *How. Pr. Rep.* 48.) I think it unwarranted by the phraseology of the act, and the fair and natural interpretation of the terms employed, and also by the source from which it is evidently drawn. The decision

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in *Crandall v. Bryan* is said to have been affirmed at a general term in the 7th district; but we have no authoritative report of the grounds upon which such affirmance was based. And although always disposed to regard with deference, and generally with absolute authority, the general term decisions of a co-ordinate branch of this court, I feel that the circumstances of this case, the want of knowledge of the precise views of the court, the novelty of the question, and the strength of my own impressions in a contrary direction, justify me in making this case an exception to the rule. I must therefore regard the 2d and 3d counts, at least, as not justifying an order of arrest. Since preparing this opinion I have met with the case of *Smith v. Corbiere*, (3 Bosw. 634,) which was decided in accordance with the views herein expressed, and the order of arrest originally granted therein was set aside with costs.

The order of arrest is presumed to have been founded upon the whole complaint—upon each and all the causes of action therein set forth. No discrimination is made between them, and probably none can be made, in the practical enforcement of the order. It is to be granted in certain actions, and only in certain actions; and I think only in actions possessing or accompanied by the insignia of fraud mentioned in the act. There is to be but one judgment and one execution; that is, only one kind of execution, so far as the amount of the debt is concerned. The judgment is homogeneous, and I know of no principle which would justify a practitioner in separating parts of a judgment and simultaneously issuing an execution against property for one part, and an execution against the person, for another. The verdict and judgment would not discriminate how much of it was composed of, or founded upon, one cause of action, and how much of or upon another. The undertaking which the defendant may give, to discharge himself from arrest, requires him to render himself amenable to the *process* of the court during the pendency of the action, and to such as may be issued to enforce the *judgment* there-

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in, (*Code*, § 187,) and, as before stated, this process does not discriminate between different causes of action set forth in the complaint.

The order of arrest, therefore, in this case, covered causes of action for which the defendant was not liable to arrest, and for that reason should, I think, be vacated and set aside. It was not warranted by law. It was imprisoning the defendant for an unlawful cause. It would result in imprisoning his person on final process, and refusing his discharge, except upon condition of paying a demand, for which the law did not authorize his detention. And I think it clear that, for these reasons, the order cannot be upheld. The question has also been substantially decided. (*Brown v. Treat*, 1 *Hill*, 225. *Suydam v. Smith*, 7 *id.* 182. *Miller v. Scherder*, 2 *Comst.* 262. *Lambert v. Snow*, 17 *How.* 517.) In *Suydam v. Smith*, the court, referring to the case of *Brown v. Treat*, say, (p. 185,) "The plaintiff had recovered upon all of the counts; and it was enough to say that where the bailor sues upon the contract—although there may be a misjoinder of other counts—the bailee cannot be imprisoned on the judgment. It was on that ground that the defendant was discharged from the arrest." In *Miller v. Scherder*, (2 *Comst.* 267, 268,) the court of appeals say, "We do not intend to question the rule laid down in *Brown v. Treat*, (1 *Hill*, 225,) as limited and explained by Mr. Justice Bronson, in *Suydam v. Smith*, (7 *Hill*, 182,) that where counts on contract and in tort are joined in the same declaration, and a general verdict and judgment are rendered thereon, the plaintiff cannot enforce such judgment by imprisonment of the defendant. In a case thus situated, the plaintiff having elected to join a non-imprisonment cause of action with one of a different character, shall be deemed to have elected to take his remedy against property alone; because the law will not allow him to prejudice the rights of the defendant by mingling his damages."

The result is, that the order of the special term must be reversed, the order of arrest vacated, and the defendant dis-

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charged from imprisonment. The defendant should also have \$10 costs on this appeal. But as a condition of granting this order, the defendant should stipulate not to bring an action for false imprisonment.

[ALBANY GENERAL TERM, December 5, 1859. *Wright, Gould and Hogeboom, Justices.*]

HARE vs. VAN DEUSEN and wife and MILLER.

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75h 454

The equitable lien of a vendor, for the unpaid purchase money, is raised by the law, in the absence of an express agreement, because it is deemed equitable that the vendee shall not take a perfect, unincumbered title to the property until he pays for it. And the lien is lost, where the parties have waived it; or where it is obvious that they contemplated a different security for the purchase money.

Where the plaintiff, for land sold by him to the defendants, received from them, in part payment, a tract of land subject to a mortgage of \$4000, which the plaintiff assumed to pay, and the defendants covenanted that such tract of land was free from all other incumbrances, but the same was in fact subject to the equitable lien of a note for \$900, given to D. the vendor of the defendants, for the purchase money; *Held* that the plaintiff, by taking the *covenant* of the vendees that the lands conveyed by the latter were free from incumbrances, had evinced his intention to rely upon that remedy, for indemnification, and had thereby waived his equitable lien, if any he had, for the unpaid purchase money. And that, at all events, payment or satisfaction, by the plaintiff, of the incumbrance created by the note, or eviction thereunder, was a condition precedent to the enforcement of such an equitable lien. There must be a substantive cause of action, existing in the plaintiff at the commencement of the suit, and the action cannot rest upon facts subsequently arising.

DEMURRER to complaint. The complaint alleged that about the 1st of May, 1858, the plaintiff sold and conveyed to the defendant Catharine Van Deusen a farm of land, in Livingston, Columbia county, subject to two mortgages thereon, for the price or consideration of \$1471.43. That in exchange and payment therefor, the defendants, Van Deusen and wife, sold and conveyed to the plaintiff a farm of land in

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Taghkanic, subject to a \$4000 mortgage thereon, which the plaintiff assumed to pay, for the price or sum of \$2000. That the plaintiff paid to the defendant Van Deusen \$528.57, being the difference in price between said two parcels of land. That in the conveyance to the plaintiff, Van Deusen covenanted that the lands were free from all incumbrances except the \$4000 mortgage. That subsequently Henry E. Decker and others, the grantors of Van Deusen of the Taghkanic lands, commenced an action in the supreme court against said Van Deusen and the plaintiffs and others, to enforce an alleged equitable lien for \$900 of unpaid purchase money thereof, for which the Deckers held the note of said Van Deusen. That on the 19th of May, 1859, a judgment was rendered in said suit in favor of the plaintiffs therein for \$1012.60, the amount of said alleged equitable lien, with interest thereon, and also directing a sale of said premises in Taghkanic for the satisfaction thereof. That at the time of his purchase from the defendants, Van Deusen and wife, the plaintiff was entirely ignorant of the legal effect of the facts charged in the complaint of the Deckers, or that a note for unpaid purchase money had the effect of a mortgage upon the land, and that he contracted with Van Deusen in ignorance thereof. That the interest of said Van Deusen and wife in said Taghkanic lands, because of said equitable lien, was less by the amount thereof, than represented and covenanted in their deed to the plaintiff, and judgment was rendered in said action of the Deckers for \$1294.48, principal, interest and costs; to which amount the plaintiff claims and insists that the consideration money of the Livingston lands purchased by the defendants from the plaintiff remains unpaid, and that the plaintiff has an equitable lien therefor on said lands. That Van Deusen was, at the time of said purchase and sale, and has ever since been, entirely insolvent, and the plaintiff will be remediless unless he can succeed in this action. That the defendant Miller is the holder of a subsequent mortgage upon said Livingston lands, dated May 7, 1858, and had notice at the time of taking the same of the

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facts constituting the plaintiff's equitable lien, and that said mortgage was taken for a precedent indebtedness. The plaintiff prayed for a judgment establishing his equitable lien, and for a sale of the Livingston lands in satisfaction thereof with costs, and for general relief.

The defendants Catharine Van Deusen and Abraham F. Miller demurred separately to the complaint, alleging several specific grounds of demurrer, and among others that the complaint did not state facts sufficient to constitute a cause of action.

B. E. Andrews and John Whitbeck, for the defendants.

John Gaul, jun. and Cornelius Esseltyn, for the plaintiff.

HOGEBOM, J. A vendor of lands has an equitable lien for the unpaid purchase money. This lien grows out of the transaction itself, and is implied by law in order properly to adjust the equities between the parties. It is not precisely founded upon contract—at least not upon express contract; for it exists although the parties may not have contracted for it, and may even have been unaware of its existence. It is aided by the law, in the absence of an express agreement, because it is deemed equitable that the vendee should not take a perfect and absolute—an unincumbered—title to the property, until he pays for it. Resting upon this natural equity, it is lost, where the parties have waived it, or where it is obvious that the parties contemplated a different security for the purchase money. Therefore where other security is taken, in the form of an express incumbrance upon other lands, or even upon the land sold, or by the note or obligation of a third person, it is deemed reasonable to infer that the parties intended to waive the equitable lien, and to rely upon the substituted security. It is a matter of considerable difficulty, sometimes, to determine when this equitable lien should be deemed to have been surrendered; for the facts often leave us in doubt what were the

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real intentions of the parties. But several rules on this subject have become, in the progress of judicial decision, well established. 1. In the event of there being simply unpaid purchase money of land, and in the absence of any agreement to the contrary, the lien exists. (*Garson v. Green*, 1 *John. Ch.* 308. *Fish v. Howland*, 1 *Paige*, 20.) 2. This lien may be waived by the express agreement of the parties, and also by certain acts from which a waiver is necessarily inferrible or reasonably implied. 3. The lien is not waived simply by taking a note, bond, or other mere personal covenant or agreement for the purchase money. (*Fish v. Howland*, 1 *Paige*, 20. 4 *Kent's Com.* 153.) This was for a considerable time a debatable question, and conflicting decisions upon it will be found in the books; but such seems to be the settled law of this state. 4. The lien is waived when any landed security upon the same or other lands, or any personal security in addition to that of the vendee is taken for the unpaid purchase money. (4 *Kent's Com.* 153. *Gilman v. Brown*, 1 *Mason*, 191. *Fish v. Howland*, *supra*. *Hallock v. Smith*, 3 *Barb. S. O. R.* 271.) This is upon the principle that the parties have looked to and contracted for another kind of security, which is inconsistent with the idea of an implied lien—implied mainly because the parties have contracted for no other, and because it is therefore deemed equitable that it should exist. 5. The lien is also waived where the parties have agreed to substitute something else for the unpaid purchase money, as the covenant or obligation of the vendee to do some collateral act. (*McKillip v. McKillip*, 8 *Barb.* 552. *Patterson v. Edwards*, 7 *Cushman's Mississippi R.* 67. *Jarrott v. Sweetland*, 3 *Myl. & Keen*, 665.) In such a case the purchase money is deemed to be paid or satisfied by such collateral covenant or obligation, and it takes the place of the unpaid purchase money as a part of the consideration or price of the land. The parties have reasonably manifested their intention to rely on something else than the implied lien; they have contracted with their eyes open, for a different form of secu-

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ity, or rather for a different mode of satisfying the purchase price of the land. 6. I think also another case of waiver arises where at the time of the purchase or conveyance the transaction is so far complete that no present debt or obligation is owing by the vendee to the vendor. If the lien ever exists, it must exist at the moment when the conveyance is made. The time of payment may be postponed, but the obligation must exist and attach to the land when the title passes and the transaction has been consummated between the parties. If at that moment it be clear that no equitable lien exists, it cannot subsequently arise.

Keeping in mind these general principles, let us consider their practical application; for here again not unfrequently new difficulties are encountered. Where on the one side the consideration is the sale of lands and on the other the payment therefor in money, no question can arise. If the whole consideration money is paid, the equitable lien is extinguished, and no new or subsequent transaction can revive it. If a portion remain unpaid, then so long as it remains unpaid, the equitable lien continues. If, as was suggested on the argument, a portion of the money thus paid is spurious or counterfeit, I have no doubt the equitable lien exists, and for the reason that to such extent there is in fact no payment. The purchase money never was completely paid. The equitable lien, therefore, is not revived by a subsequent transaction, but it was never lost or extinguished. But suppose a portion of the money to have been uncurrent or depreciated, and that fact known to the parties, but nevertheless accepted at its nominal par value, is it not clear that no equitable lien would exist to the amount of such depreciation; in other words, that there would be no unpaid purchase money? Even where the fact of depreciation was not known, but both parties acted with equal means of knowledge and without fraud, I think the actual depreciated character of the money paid would not raise an equitable lien to the extent of such depreciation. I have considerable doubt whether the fraud would do so, if fraud in

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fact existed. The fraud would furnish the basis of an action for damages, or for rescinding the contract, but I think it would not originate or resuscitate an equitable lien, where the transaction was in fact consummated at the time of taking the deed. The equitable lien does not spring from such a source. Take another case. Suppose the vendee, in payment of the purchase money, should deliver to the vendor the check or note of a third person, representing it to be good, and the vendor in good faith accepted the same, and it was in fact worthless, and so known by the purchaser to be at the time. Would the equitable lien exist to the amount of the note? I think not; for the reason that the purchase money was paid—treated as paid by the acts of the parties—that the vendor had accepted different security, and was at the time satisfied with it. No doubt the vendee would be liable for the fraud; probably the contract might be rescinded for that cause; but I am not able to see that the vendor could *affirm* the transaction, treat the contract as *executed*, and still rely upon the equitable lien for purchase money unpaid, which had in fact been paid to him at the time, in a manner entirely satisfactory.

Where the transaction consists of a sale of land on the one side and the payment therefor by other land in whole or in part, it is easy to see that difficulties may, under certain circumstances, arise. If the lands on each side are taken at certain valuations agreed upon by the parties without fraud, it would seem to be precisely the same as if an amount of money was paid equal to such valuation. If fraud was practised, so that the land received in exchange was over-valued, I do not think an equitable lien as for unpaid purchase money would arise to the extent of this over-valuation. The vendor chose to take this land as part payment; he chose to take it at a specified price; the purchase money was in fact adjusted; the transaction was consummated, and I think the lien was at an end. If, as is conceded, a mortgage upon other lands would extinguish the equitable lien, would not a payment in other lands extinguish the equitable lien? No doubt the aggrieved

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party has a remedy ; but it is not the enforcement of an equitable lien. He may sue for the fraud ; he may perhaps rescind the contract ; but he cannot, I think, affirm the transaction in part and disaffirm it in part and file a bill to satisfy an equitable mortgage, which, if the transaction is to stand, has been in fact paid.

Again ; suppose the transaction to be a sale of lands, on the one side, at an agreed valuation, paid for on the other by a conveyance of other lands at an agreed valuation, and represented and covenanted to be free from incumbrance. Suppose the valuations of the land to have been fair, and intelligently agreed to, on either side, but the lands received in payment to have been in fact subject to a valid prior incumbrance for half or any other part of their value. Would the existence of this incumbrance raise an equitable lien ? I think not ; for the following reasons : 1. The parties have agreed upon a different remedy, to wit, one founded upon the covenant against incumbrances. The insertion of such a covenant in the deed was for the precise purpose of affording a remedy for its breach ; and this positive and affirmative remedy must be deemed the one which the parties had in view, and not a reliance upon an equitable lien, the foundation for which, to wit, the existence of unpaid purchase money, was not within the contemplation of the parties, at the time. The parties have therefore practically ignored a resort to such a lien. 2. There is in fact no unpaid purchase money ; the purchase money has been all paid—all arranged to the satisfaction of the parties ; the conveyances have been respectively made and accepted, and the full amount of the purchase money thus made up. If the breach of the covenant against incumbrances is to be regarded to the extent of the incumbrance as unpaid purchase money, then a breach of the covenant of seisin, of right to convey, of further assurance, of general warranty, must also be regarded, to the extent of the damages recoverable in actions upon them respectively, as equivalent to equitable liens for unpaid purchase money, and entitling the party to foreclose the same.

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Express covenants in a deed will no longer be regarded as excluding implied covenants therein. 3. At all events payment or satisfaction by the vendee, of the incumbrance, or eviction thereunder, must be regarded, I think, as a condition precedent to the enforcement of such an equitable lien. Until payment or eviction, it cannot be known but that the incumbrance will be satisfied by the party from whom it is owing. Until such event the equity of the vendee does not arise.

The plaintiff in this action, according to the case made in his complaint, is in the predicament last supposed. For land sold by him he has received from the defendants, in part payment, a tract of land covenanted by them to be free from incumbrances, but actually subject thereto. Fraud is not pretended—not even ignorance of the facts constituting the incumbrance, but only ignorance of the law. The incumbrance has not been paid or satisfied by the plaintiff; nor has he been evicted from the land. It is true a decree for foreclosure has been obtained, but that is nothing more than a judicial establishment of the incumbrance. It may, and probably will, lead to a sale of the property and the eviction of the plaintiff; but that event has not yet occurred; at least not before the commencement of the suit. It is said outside of the complaint, that a sale has in fact taken place since the commencement of this action, and that this fact may be supplied by amendment or supplement. But a substantive cause of action must exist at the time of the commencement of the suit, and cannot rest upon facts subsequently arising. I think the action, if ever maintainable, is prematurely brought. However that may be, it is sufficient to say that we must adjudge the case by the facts now before us, and the plaintiff must judge for himself, of the expediency of availing himself of the privilege of amendment.

I think that in this case the vendor, by taking the *covenant* of the vendee that the lands in Taghkanic are free from incumbrance, has evinced his intention to rely upon that remedy for indemnification. In other words, he has waived his lien,

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if any he had. It may be said that the taking of the covenant against incumbrances is no more than a taking of the note or bond of the vendee; that it is relying upon the personal security of the purchaser. But I think it is more. It is evidence of the intention of the parties to adopt a particular form of remedy in case of a breach of that part of the contract, and to dispense with the equitable lien, which is only preserved where it is clear that the parties have not intended to waive it, or to rely upon a different security.

We have no adjudicated cases, of which I am aware, upon precisely similar facts; but some are nearly analogous in principle. In *McKillip v. McKillip*, (8 Barb. 552,) it was held that where the consideration of the conveyance of land was the covenant of the vendee to support the vendor and another, the vendor retained no equitable lien upon the land. It was put upon the ground that the *covenant* of the vendee was substituted for the purchase money, or as a mode of payment of the price of the land.

In *Clark v. Royle*, (3 Sim. Rep. 399; 2 Story's Eq. Jur. 655, § 1227, note 2,) it was held that where the consideration of the conveyance was a covenant to pay an annuity to the vendor for life, and a distinct annuity to other persons, a breach of the covenant as to the latter would not enable them to enforce an equitable lien for the payment of the money due to them, for they are not parties to the conveyance, and stand in no privity to establish a lien, at least unless the original agreement imports an intention to create such a lien. In *Parrott v. Sweetland*, (3 Myl. & Keene, 655,) where the vendor, in lieu of £3000, (the purchase money,) agreed to accept £100 annually for the joint lives of the vendor and her intended husband, if the purchaser should so long live, to be secured by the purchaser's bond, which provided for the payment of the £3000 in certain events, and a receipt was indorsed upon the conveyance "of a bond for £3000, being the full consideration within expressed to be given;" it was held that the vendor had agreed to accept such a bond as a *substi-*

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tution for the price, and that the lien for the purchase money was consequently discharged. In *Patterson v. Edwards*, (7 *Cush. Missis. Rep.* 67,) it was held, in 1855, that where the vendee agreed to pay for the lands \$10,000 cash, and to take up and deliver to the vendor two certain notes (of the vendor) due to the Planter's Bank, and secured by his mortgage, the taking of the collateral obligation of the vendee to take up the notes was a waiver of the lien for the purchase money; that in order to create a vendor's lien, there must be a *debt* for unpaid purchase money, to a *fixed* amount, and due directly to the *vendor*; that if the obligation consists of a *collateral* covenant, or be for the discharge of a liability to a *third* party, no lien exists, where the conveyance is absolute; and that the lien is waived, where the obligation of the vendee to discharge such liability appears to be substituted for the purchase money.

The principles adopted in some of these cases, if they are to be regarded as authoritative expositions of the law, are subversive of the plaintiff's right to recover. The plaintiff, with a knowledge of the facts, as we must assume, though not of the law, has chosen to take the covenant of the defendant, 1, to discharge certain incumbrances; and 2, that the premises are free from all others. Has he not made his election to rely upon the covenant, and accepted it as a substitute for the purchase price of the land? This covenant is intended by the parties for his indemnity, and he must show he is damaged before he is entitled to recover. It requires some ingenuity to regard this claim in the light of unpaid purchase money, and more to presume that the parties intended thereby to preserve an equitable lien to the plaintiff, therefor.

There must be judgment for the defendants on the demurrer, with leave to the plaintiff to amend on payment of costs.

[COLUMBIA SPECIAL TERM, JANUARY 9, 1860. *Hogboom*, Justice.]

THE PEOPLE OF THE STATE OF NEW YORK *vs.* THE MAYOR,
ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
and ROBERT T. HAWS, comptroller of said city.

Where there is a clear violation of law, or a clear misuser or abuse of its corporate powers, on the part of a municipal corporation, it is an appropriate ground for an injunction.

Where an act threatened to be done is one of serious consequence to the public, such as the execution of leases for ferry privileges, for a term of years, which leases, if made, will confer rights of property, and the fact of their having been actually granted might present embarrassment in the way of their being subsequently set aside, the preventive remedy by injunction may be resorted to.

The people, as representing the general public — the body of citizens who are aggrieved — are the proper parties to enforce such remedy.

A lease of a ferry, executed by the corporation of the city of New York, which requires twenty per cent of the annual rent to be paid at the time of the sale of the privilege; that security be given only for the remainder; that there be a bid equal to the present aggregate amount of the rent of the ferries, as a condition of purchase; that the lessees shall keep, on each ferry-boat, a fire apparatus or force pump, with hose, to be used for the extinguishment of fires, under the direction of the chief engineer, for which the lessees are to be compensated at the rate of twenty dollars per hour, is not, by reason of those provisions, a violation of the 41st section of the amended charter of 1857. (*Laws of 1857, ch. 446.*)

A sale or lease of the five ferries between the cities of New York and Brooklyn, together, the purchaser being required also to purchase the entire ferry property attached to all the ferries, is not a violation of the act of 1857, either in letter or spirit. There is nothing which forbids a sale in that form, or requires a sale of the ferries, or of the ferry property, separately; and the mode of sale is left to be governed by a sound discretion.

Title to property is always held upon the implied condition that it must be surrendered to the government, either in whole or in part, when the public necessities, evidenced according to the established forms of law, demand.

In regard to *ferries* there is a still further right which the public may exercise, to wit: the right of regulating the rates of ferriage, and of so controlling ferry franchises and privileges in the hands of grantees or lessees, that they shall not be abused, to the serious detriment or inconvenience of the public. The grantees of ferries, or ferry rights, must be deemed to accept the grants subject to these implied conditions.

When the New York and Brooklyn ferries or ferry rights were conveyed to the Mayor, Recorder, Aldermen and Commonalty of New York, by the colonial governors, Dongan, Cornbury and Montgomerie, the grantees took the same subject to this governmental regulation and control. On the change

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of government from a colony to a state, this right passed to the supreme power in the state; and it may now be manifested and exercised by the legislature acting for the people in their sovereign capacity.

And although the corporation of New York should execute to a grantee a lease of those ferries, unqualified in its terms, and silent as to the prices which should be charged for ferriage, except in respect to the maximum rate specified in the notice of sale, those rates would still be subject to legislative supervision and control, and the lessees would take the same subject to such qualification. *Per HOGESBOOM, J.*

While the regulation of the rates of ferriage upon the New York and Brooklyn ferries is within the control of the legislature, and, so long as those rates are not regulated by them, they are the proper subject of regulation, by the city government, or of contract between the corporation and its lessees, it is a very different question whether, and to what extent, it ought to be interfered with by the courts. *Per HOGESBOOM, J.*

Where a regulation fixing the maximum rate of ferriage, for foot passengers, at two cents, is alleged to be an abuse of corporate power, if the matter is so plain that it will amount to fraud, or palpable oppression upon the citizens who shall have occasion to cross the ferry, it seems a court of equity should interfere. *Per HOGESBOOM, J.*

But it seems that a mere difference of opinion between the court and a municipal corporation, as to the proper rate of ferriage to be charged, ought not to induce an interference by injunction; especially where the erroneous judgment of the corporation, if it exists, may be corrected by an appeal to the legislature.

Such a power, if it exists in the courts, ought to be most cautiously exercised. The corporation of New York is by its charters, taken in connection with its subsequent action under the same, vested with the property of certain ferries, and with the right to establish others. Incident to that right, in the absence of legislative action, must be the right to establish rates of ferriage.

And the matter being left to the discretion of the corporation, it may exercise such discretion by passing resolutions fixing the maximum rates of ferriage, as effectively as by the passage of a local law, for that purpose.

The act of May 14, 1845, to establish and regulate ferries between the city of New York and Long Island, was by operation of law, repealed by the amended charter of New York, granted in 1857.

MOTION for an injunction. The facts sufficiently appear in the opinion of the court.

L. Tremain, J. W. Gilbert, P. S. Crook and J. W. Edmonds, for the plaintiffs.

W. M. Evarts and Moses Ely, for the defendants.

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By the Court, HOGEBROOM, J. This is an application by the plaintiffs for an injunction to restrain the defendants from granting any lease or leases of the Fulton, Catharine street, South, Hamilton avenue and Wall street ferries, between the cities of New York and Brooklyn, and especially to restrain them from making the same in the manner proposed in the public notice of the sale thereof by the comptroller, under date of November 16, 1859.

The application is founded on two general grounds :
1. That by the act of May 14, 1845, the defendants have no authority to make any sale or lease of the ferries in question, but that the same is confided to commissioners appointed by the governor. 2. That if the defendants have the power of sale or lease, they are conducting the same in violation of the amended charter of the city of New York, of April 14, 1857, and also in violation of the duties imposed upon them as a municipal corporation, to the public at large. It will be convenient to consider first, this last branch of the application.

If the plaintiffs have in fact established a clear violation of law, or a clear misuser or abuse of their corporate powers, on the part of the defendants, I regard it as an appropriate ground for an injunction. The threatened act is one of serious consequence to the public. The leases, if made, confer rights of property, and are to last for ten years, and the fact of their having been actually granted, might present embarrassment in the way of their being subsequently set aside. Under these circumstances the preventive remedy is not only lawful, but is the safest and best which can be adopted. (*Story's Com. on Eq. Jur.* §§ 907, 8, 9. *Code*, § 219. *Benson v. Mayor &c. of New York*, 10 *Barb.* 226. *Davis v. Mayor &c. of New York*, 14 *N. Y. Rep.* 506. *Milhau v. Sharp*, 17 *Barb.* 445.)

I think too, the people are the proper parties to enforce the remedy. They represent the general public—the body of citizens who are aggrieved. An individual would not be authorized to institute the action. Probably the commissioners,

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under the act of 1845, would be regarded as possessing a mere naked authority to lease, not coupled with an interest. Their lessees, if any there be, which does not appear, might doubtless, if the act be in force, sue for a violation of their rights; but I doubt if even such an action would bar a suit by the people, instituted by their attorney general, to prevent violations of charters, of general laws, and of common law obligations, tending to the irreparable injury and prejudice of the citizens at large. Especially is this so, when it does not appear that there are any lessees under the act of 1845; nor that they are disposed to institute such an action; and when the very nature of the remedy in part sought—the prevention of excessive rates of ferriage—is one which such lessees might not feel inclined to enforce. (*Doolittle v. The Supervisors of Broome County*, 18 N. Y. Rep. 160. *People v. Mayor &c. of New York*, 9 Abbott, 253. *Hale v. Cushman*, 6 Metcalf, 425. *Roosevelt v. Draper*, 16 How. Pr. Rep. 137. 7 Abbott, 108. *Mann v. Westover*, Sup. Court, 3d dist.)

Waiving for the present a discussion of the question, whether the law of 1845 is valid or is in force, let us next consider the question whether the defendants have been guilty of such a violation of their common law or statutory duties or obligations as justifies the interference of this court. The 41st section of the amended charter of 1857, (*Laws of 1857, ch. 446*), requires all ferries to be leased, and the leases to be made by public auction and to the highest bidder who will give adequate security, to be limited to, that is not to exceed, ten years in duration, and to be revocable by the common council for mismanagement or neglect to provide adequate accommodations—the lessees to purchase, at a fair appraised valuation, the boats, buildings and other necessary ferry property of the former lessees—previous notice of all such sales (and leases) to be given under the direction of the comptroller for thirty days in each of the daily newspapers employed by the corporation.

It is claimed on the part of the plaintiffs, that by the terms

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of the proposed lease, this section has been violated in several particulars; in requiring twenty per cent of the annual rent to be paid at the time of the sale; in requiring security only for the remainder; in requiring a bid equal to the present aggregate amount of the rent of the ferries, as a condition of purchase; in requiring the lessees to keep on each ferry boat a fire apparatus, or force pump, with hose, to be used for the extinguishment of fires, under the direction of the chief engineer, for which the lessees are to be compensated at the rate of \$20 per hour.

I cannot discover in any of these provisions a violation of the statute in question. The provisions of the law are general—not entering into much detail—imposing certain restrictions and obligations, but not prohibiting other and additional ones. The leading object of the section was to secure publicity of notice—free competition at the sale—and in the limited duration and revocable character of the leases, protection to the public. To require a certain moderate sum to be paid in cash at the time of the sale, was not an unreasonable or unusual requirement, and was advisable, if not necessary, to prevent fraudulent bids. Nor do I think it violated the provision that the sale should be to the highest bidder, who should give adequate security. This provision must receive a reasonable construction. It was not intended, I think, as compulsory on the corporation to take security for the entire amount, but for such amount as in the exercise of a sound discretion they should think reasonable. It might be literally complied with by a condition of sale which should require the whole purchase money to be paid the next week after security was given; but that would be unreasonable. So of the requisition to pay or bid, at the time of the sale, an amount equal to the present annual rental of the ferries, (\$56,000,) as a condition of purchase. This does not violate the section which requires a sale to the highest bidder. If the highest bid be for a sum less than that amount, the only consequence is, that there is no sale; and a new advertisement, perhaps on more favorable

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terms, becomes necessary. Nor is the condition an unreasonable one. It evinces a just regard for the interests of the city. It is not pretended that the rent is unreasonable in amount, and it expressly appears that it does not exceed a fair rent of the public slips and piers for commercial purposes.

The provision requiring the lessees, for a proper compensation, to have attached to the fire engine on each boat a fire apparatus and hose, is certainly not a violation of the section above referred to, for it says nothing about it, and I cannot regard the provisions therein made for the benefit of the lessees and the public, as exclusive or prohibitory of other just and salutary conditions, not inconsistent therewith, imposed by the corporation of New York for the benefit of their constituents. I regard this particular condition as not unreasonable, having in view the frequency of fires in the vicinity of the landing places of these boats, and the convenience of operating the fire apparatus by means of the engines upon the boats. It is, I think, a police regulation, competent for the defendants to make. It may be said, also, in reference to all the before mentioned alleged violations of this section, that none of them appear to be in derogation of the rights of the general public, or that particular public more immediately represented by the defendants, and, therefore, scarcely afford ground for interference by injunction at the suit of the people, with the action of the defendants in these particulars.

The other principal objections to the proposed sale or lease of the ferries are, that they are proposed to be *leased together* in a single lease; that the purchaser is required to purchase the entire ferry property attached to the five ferries; that the rate of ferriage allowed to be charged for foot passengers is extravagant and oppressive, and that the proposed mode of leasing is the result of a fraudulent combination between the defendants and the Union Ferry Company, having for its object to destroy competition, and to confer upon the last named company a substantial monopoly of the ferry privileges.

These are the more important allegations in the case, and

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require the consideration of two questions: *First*. How far these allegations are founded in fact; and *Second*. How far they justify the interference of this court.

They are claimed to be, in part, violations of the act of 1857, and, in part, violations of the general obligations or duties resting upon the defendants as a municipal corporation towards the public.

There is no express provision in the notice that the ferries shall be sold together, but it is fairly to be inferred from the terms of the notice, and is necessary to be done in order to comply with the resolutions of the common council. Such a sale is not a violation of the act of 1857, either in letter or spirit. There is nothing which forbids a sale in that form, and it is left to be governed by a sound discretion. How far such discretion may be regulated or controlled by the action of the courts, is a question which I shall hereafter discuss. For the present I shall consider the question of fact.

The affidavits on the part of the plaintiffs tend to show that the ferries could be profitably run at a charge of one cent for foot passengers, and that responsible persons are ready to take a lease of the ferries upon that condition, paying the present rental to the city of New York; and that a proposal so to run the same was presented to the defendants by the public authorities of Brooklyn; and that the chief manager of the Union Ferry Company has admitted that they could be so run at one and a half cents ferriage for each foot passenger—and at one cent if some of the night boats were removed from certain of the ferries—that some of said ferries were heretofore run at a charge of one cent for foot passengers, and were remunerative at such a price. It further satisfactorily appears that the said ferries are run at the present time at two cents per foot passenger; that the population of Brooklyn is 250,000 to 280,000; that the number of foot passengers per day averages 70,000, or more, and from 25,000,000 to 33,000,000 per year; that the foot passengers yield about 81 per cent of the whole income of the ferries; that at the charge

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of two cents for foot passengers, the ferries, over and above the necessary expenses of running the same, pay the annual rents of \$56,000 to the city of New York, a clear income of at least 8 per cent on \$800,000, the alleged amount of capital invested, (claimed by the plaintiffs to exceed by \$200,000 the actual amount needed for the proper maintenance of the ferries,) and that the ferry company have on hand a surplus of \$100,000 or thereabouts, to meet claims for damages and other contingent expenses. It is further alleged on the part of the plaintiffs, that putting up the ferries for sale or lease together, requires not only the purchase (according to the terms of sale) of the entire ferry property of the present ferry company, exceeding \$500,000 in value, but also an aggregate amount of purchase money and security, which only a combination of wealthy citizens can supply, and is thus directly and effectually calculated to destroy competition; and that the whole proceedings on the part of the defendants, thus tend to oppression and injustice, and constitute a misuser and abuse of their corporate rights and obligations.

The affidavits on the part of the defendants tend to show that the fair annual rent of the property of the defendants now used by the Union Ferry Company in running the ferries in question is \$55,000; that the ferries are well conducted, and run at a uniform rate of ferriage; that this uniform rate is highly promotive of the public convenience, if not absolutely essential to the lives and safety of passengers, in preventing the more accessible of them from being over-crowded; that the Fulton ferry would rent for more, if rented alone, than the whole five ferries together, including the Fulton, and that the public safety and accommodation as well as the interests of both the cities of New York and Brooklyn will be best consulted by having them all under one uniform management, and conducted by a single interest.

These affidavits are to some extent, though not to a very great extent, conflicting, except in regard to the opinions of the several deponents. From the best consideration that I

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have been able to give to them, I am satisfied, in the first place, that in the projected proceeding of the defendants there is no violation of the charter of 1857. There is no provision requiring a sale of the ferries, or of the ferry property separately, nor forbidding a sale of them together. Unless, therefore, a sale in the latter mode would be highly prejudicial to the public interests or convenience, or inequitable to that degree which would bring it fairly within the grasp of a court of equity, I ought not to interfere—for it is to be observed, that no complaint is made that the corporate authorities of New York are guilty of a breach of trust towards their constituents—and therefore, the ground for equitable interposition does not exist, which arises when a trustee or other person standing in a fiduciary relation is doing some act to the prejudice of the parties whom he immediately represents. Hence it is not like the cases of *Milbau v. Sharp*, (15 Barb. 193;) *Stuyvesant v. Pearsall*, (*Id.* 244,) and other parallel cases. Accordingly, the ground upon which an injunction must rest, must either be that the defendants are guilty of a violation of law, or of misuse or abuse of corporate privileges or obligations; or of some breach of trust which they owe to the general public, represented by the people, and which courts are bound to protect. It is highly probable that the great value of the property, and the magnitude of the interests involved, will in a degree affect competition at the sale. But this is incident to the very nature of the business, and must give way to superior considerations, if such there be. From the facts developed in these affidavits, it is highly probable that some of these ferries, considered by themselves, are not very remunerative even at the present rates of fare; and yet that they are eminently conducive, if not absolutely indispensable to the public convenience and accommodation. I can well conceive, also, that they may possibly be better managed, with a view to the accommodation and safety of travelers and passengers, if under the direction of a single concern, with uniform rates of ferryage, than if attempts were made by rival interests in the

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possession of the different ferries, to attract travel to their several localities by diminished rates of ferriage. It is quite possible that sufficiently remunerative returns for capital invested would be realized to the lessees, at a charge of one and a half cents, or even one cent for foot passengers—and this view of the case is strengthened by the fact which sufficiently appears, that competent and responsible persons are willing to take a lease of the ferries at that price. This circumstance is one which, if made apparent to the defendants, ought to have had, and ought to have great weight with them in fixing the maximum rate of ferriage which the lessees shall be permitted to charge. But can this court, in the exercise of its legitimate functions, control the action of the common council in that respect? This involves an inquiry into the extent and character of the rights of the defendants in the ferries in question, and how far, if at all, they are subject to judicial supervision and control.

I do not propose to enter into an extended enumeration or examination of the provisions of the Dongan, Cornbury or Montgomerie charters. I have examined them all, and have been presented by counsel, with a sufficiently copious abstract of them. A statement of them is also contained in the opinion of Mr. Justice Barculo, in the case of *Benson v. The Mayor &c. of New York*, (10 Barb. 223.) The validity of these charters is not denied by the counsel for the plaintiffs; nor so far as they confer rights of property, if the defendants, as a municipal corporation, may lawfully take grants of property, is it claimed that these rights of property can be invaded. It is very properly conceded that rights of this character are inviolable, and they rest for their security not merely upon the constitutional provision that "no state shall pass any law impairing the obligation of contracts," but upon the immutable principles of justice and equity, which require the rights of private property to be respected, even when governments are overthrown. So far, therefore, as these charters confer rights of property, they are inviolable; inaccessible to legisla-

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tive or judicial interference, except in some of the forms well recognized by law.

I cannot assent to the proposition that a municipal corporation is incapable of taking real estate by grant, so as to have a right of property in the thing granted. I suppose, that under these charters the defendants have property rights in the *markets, the city hall, the lots of ground and public lands, the docks and the ferries* mentioned therein. They hold them as grantees, as owners, by contract, by a title equally strong and inviolable, I think, as do private individuals or corporations. They hold them, it is true, in trust for their constituents, and are answerable in a proper way to them for a breach of trust. But I know of no way in which their grantors, or the successors of their grantors, can lawfully invade these rights. They may hold them or certain of them, also, only for certain purposes, and in such case, the right of external interference with their administration of them depends upon the question whether those purposes have been violated or disregarded.

But, it is to be observed, that neither as regards municipal corporations nor private persons, is the right of property strictly absolute and intangible. Property is subject to be taken under the right of *eminent domain*. It is subject to *taxation* by the public authorities. And when it is in this way required for public purposes, the right of the property holder must yield to the paramount right of the public. Title to property is always held upon the *implied condition*, that it must be surrendered to the government, either in whole or in part, when the public necessities, evidenced according to the established forms of law, demand.

In regard to *ferries*, I am of opinion that there is a still further right, which the public may exercise, to wit: the right of *regulating the rates of ferriage*, and of so controlling ferry franchises and privileges in the hands of grantees or lessees, that they shall not be abused, to the serious detriment or inconvenience of the public. It seems to me that the

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grantees of ferries, or ferry rights, must be deemed to accept them subject to these *implied conditions*. The people, represented by their king or their governor, as the case may be, own these rights, and hold them for the benefit of the mass of citizens of which the public is composed—and their representative, their king or their governor, must so administer them as that the rights of the public must be preserved. They cannot be conveyed away or surrendered. The navigable waters belong to the people, the sovereign power; they are for the use and navigation of the subjects or constituents of the government; and they cannot be transferred, even the usufructuary interest in them, so as to divest the government of that control over them, which is essential to protect and preserve the interests of the citizen. At least, I think the legal presumption is, that the grants of ferry rights are conferred and accepted with *such qualifications*. It is possible that a different question might arise if it was established that, as between the grantor and the grantee, a pecuniary or other valuable consideration was actually paid for the transfer or conveyance of a ferry right, not only present, but prospective. When such a state of facts presents itself, it will raise the question whether a government can for any consideration, or upon any pretense whatever, grant away or relieve itself from those rights and obligations which belong and are due to the constituent body, and are essential to their safety and well being. (*Town of East Hartford v. Hartford Bridge Company*, 10 How. U. S. Rep. 511. *Gozzler v. Corporation of Georgetown*, 6 Wheaton, 596. *West River Bridge v. Dix*, 6 How. U. S. Rep. 507. *Charles River Bridge v. Warren Bridge*, 11 Pet. U. S. Rep. 421. *Lansing v. Smith*, 4 Wend. 9. *Brick Presbyterian Church v. Mayor &c. of New York*, 5 Cowen, 538. *People v. Morris*, 13 Wend. 325.)

I am therefore of opinion that when these ferries or ferry rights (the distinction between which I shall presently consider) were conveyed to the mayor, recorder, aldermen and

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commonalty of New York, by the colonial governors, Dongan, Cornbury and Montgomerie, they took the same subject to the governmental regulation and control, to which I have referred; that this right passed on the change of government from a colony to a state, to the supreme power in the state; and that it may be now manifested and exercised by the legislature acting for the people in their sovereign capacity.

It is in strong confirmation of these views that both the colonial and the state legislatures, notwithstanding those apparently unqualified grants, have repeatedly enacted laws regulating the rates of ferriage over these very waters, as well as over other tide waters, the right to establish ferries across which has been conferred by acts apparently unqualified in their terms. The statute books both of the colony and of the state are full of instances in which this right has been asserted, and I do not deem it necessary to cite them in detail. It is also worthy of observation that the Cornbury charter, (if not the others,) in granting leave to the corporation of New York to establish ferries for transportation, under such rates as had been usually paid, adds—"Or which at any time hereafter shall be by them established *by, and with the consent and approbation of our governor and council of our said province, for the time being.*" It seems to me, therefore, that notwithstanding the defendants should, under the sale which they have notified, convey to the purchaser a lease of these ferries, unqualified or silent as to the prices which should be charged, except the maximum rate specified in the notice, these rates would still be subject to legislative supervision and control, and that the lessees would take the same subject to such qualification. It may be said that the legislature, under pretense of regulating the right, might practically destroy it by reducing rates of ferriage to a non-remunerative standard. This is possible. Like all other powers of a similar character—like the taxing power—it is susceptible of abuse. It is not to be presumed that the legislature will do injustice. If

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they prove recreant to their duty, the remedy consists in giving their places to others, and reforming the evil.

There is also another distinction of great importance to be observed—that is the distinction between a thing in *esse* and a thing not yet in existence—between a grant of actual property and a right to create property—between a conveyance of an existing ferry and a grant of a power to establish future ferries. The one conveys property, and with it, all the ordinary rights which attach to the ownership and possession of property; the other is a mere naked power not coupled with an interest, not conferring an interest. When the last of these charters, the Montgomerie charter, was granted in 1730, there was but a single ferry in existence—the *Fulton* ferry—and none was afterwards established till 1816, and then the *Catharine street* ferry. The *South ferry* followed in 1835—the *Hamilton avenue ferry* in 1846, and the *Wall street ferry* in 1853. Now, so far as the *Fulton* ferry is concerned, which existed prior to the date of the *Dongan* charter, in 1686, there was something upon which the charter could instantly operate, and carry with it valuable property rights—and so far as the other ferries are concerned, which were actually established before any legislative interference took place, the power was executed—the ferries were established under lawful authority, and, I think, carried with them equally valuable and inviolable property rights. This covers the case of the *Catharine street* and *South* ferries. But as to the *Hamilton avenue* and *Wall street* ferries, which were both established after the passage of the act of May 14, 1845, which placed the power of leasing or licensing ferries in the hands of commissioners appointed by the governor, the question is entirely different, and the question arises whether the government could not reclaim the powers; conferred, it is true, by the government of the colony upon the corporation of New York, but unexecuted at the time of the passage of the last named act.

This question brings into view the distinction between pow-

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ers of a public nature and those of a private nature—a distinction now well understood and judicially recognized. The latter class of powers—powers coupled with an interest—powers conferring rights of property, as before stated, is incapable of recall. These powers, when practically exercised, are converted into property rights, and have all the incidents belonging to the rights of that character. But powers of the other class—public powers—are a mere delegation of political sovereignty, conferred upon the grantee as the mere agent of the sovereign, and liable to recall at the pleasure of the sovereign. Conferred for the purpose of the public good, and not of private emolument, it belongs to the sovereign to determine whether they can be most faithfully and wisely executed by the sovereign or the agent, and that determination is manifested when the sovereign does any act inconsistent with the further exercise of the power by the agent or donee of the power.

This class of powers is vested in the government for the general good—is supposed to be delegated with no other object, and may be resumed at the pleasure of the sovereign. Accordingly, in reference to this very charter, this very power of legislative resumption or recall, has been repeatedly exercised, and particularly in reference to the rights of the corporation to appoint measurers of grain, and license innkeepers. Various other powers enumerated in the charter have been taken away or practically treated as under legislative control by the charter of 1857, and the judicial decisions are numerous which recognize the distinction here noticed, not only generally, but as applicable to the charter in question. (*People v. Morris*, 13 *Wend.* 325. *Bailey v. Mayor &c. of New York*, 3 *Hill*, 539. *East Hartford v. Hartford Bridge Company*, 10 *How. U. S. Rep.* 534. *Brick Presbyterian Church v. Mayor &c. of New York*, 5 *Cowen*, 538. *Vanderbilt v. Adams*, 7 *id.* 349. *Lloyd v. Mayor &c. of New York*, 1 *Seld.* 374. *Wilson v. Mayor &c. of New York*, 1 *Denio*, 595.)

But while it appears to me that the regulation of the rates

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of ferriage upon the ferries in question is within the control of the legislature, and so long as such rates are not regulated by them, they are the proper subject of regulation by the city government, or of contract between the defendants and their lessees, it is a very different question, whether, and to what extent, it ought to be interfered with by the courts. Am I in a condition to say that under the circumstances the provision fixing the maximum rate of ferriage for foot passengers at two cents, but not requiring the imposition of such a rate, is an abuse of corporate power? If the matter is so plain that it will amount to fraud or palpable oppression upon the citizens who shall have occasion to cross the ferry, then a court of equity should probably interfere. But I am not satisfied that such a conclusion would be well founded. It results then in this, ought a mere difference of opinion between the court and a municipal corporation, as to the proper rate of ferriage to be charged, to induce an interference by injunction—in a case, too, where the erroneous judgment of the defendants, if it exists, may be corrected by an appeal to the legislature.

This is probably the most important question in the case. It is very clear that such a power, if it exists in the courts, ought to be most cautiously exercised. The corporation of New York are by their charters, taken in connection with their subsequent action under the same, vested with the property of certain ferries, and with the right to establish others. Incident to that right, in the absence of legislative action, must be the right to establish rates of ferriage. The right would otherwise be valueless. These rates should of course be reasonable. Who is to decide that question? The legislature *may* do so, as I have endeavored to show. If they do so, the corporation are certainly justifiable for adopting their rates. If they do not, is not that very omission to act a tacit manifestation of the public will that it shall be left to the discretion of their grantees? The defendants are themselves a local legislature; and, I think, they have a right to legislate on this question. If there were no general law, why might

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they not pass a local law fixing the rates of ferriage on the several waters about their city? But it may be said they have passed no law. Perhaps not in form, but have they not manifested their will, their intent, their judgment, in just as effective a way in the resolutions passed by them, fixing the maximum rates of ferriage? And is not this a matter submitted to their sound discretion in the absence of legislative action, fraud or palpable abuse? I think these questions must be answered in the affirmative. I need not cite authorities to the proposition that where a matter is left to the discretion of a subordinate tribunal, the exercise of that discretion in good faith, unattended with fraud or abuse on their own part, or imposed upon them by others, is absolutely conclusive. The remedy for their errors of judgment consists not in an appeal to the judicial power to overrule an authority confided to them by law, but in an appeal to the law-making power to overrule them by paramount legislation, or in an appeal to the people to eject from office the unwise and unfit incumbents thereof. I am, therefore, of opinion that, so far as this branch of the application is concerned, the injunction must be denied.

So far as the application is founded upon the allegation of a fraudulent combination between the common council of New York and the Union Ferry Company, to enable the latter to obtain the lease by imposing terms which cannot be complied with by others, I think it must fail for the want of sufficient evidence of the fact. The allegation in the complaint to that effect is not verified. It is accompanied by the affidavit of Alderman Dayton, of his belief of the fact, but that is too vague and indefinite to operate as the proper foundation of an injunction. Besides, it is repelled, so far as it can be, by the affidavit of Comptroller Haws. The facts relied upon as sufficient evidence from which to infer the fraud, are, in my judgment, inconclusive. The shortening of the leases, to take effect in the contingency of a sale, but not otherwise, is well enough accounted for by the supposed importance of selling

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the ferries together for a uniform term, expiring at the same period; the refusal to adopt the proposition of the committee of the Brooklyn common council, and to listen to their suggestions, may have been an error of judgment, but does not, I think, justify the imputation of bad faith; and the conference, and to some extent concert, between the comptroller and some of the members of the common council and the chief manager of the Union Ferry Company was natural enough in a matter of so much importance; or at least does not seem to me sufficient to support the allegation of a fraudulent combination. Indeed, the agents of the corporation, in the whole matter are, as I have heretofore stated, not supposed to have acted with any disregard of the interests of their constituents, the citizens of New York; the charge, on the other hand, being of too anxious if not rapacious a wish to serve them. But even of this there is no sufficient evidence; as the rental of the ferries reserved to the city does not exceed the fair rental of the slips, piers, and ferry accommodations in the possession of the ferry company, if disposed of, for ordinary commercial purposes. As before stated, there is no sufficient evidence of fraud implicating the parties concerned in the negotiations and arrangements for the leasing and advertising of the ferries, from which to infer any corrupt bargain between them, to participate as individuals, in the profits of the transaction if ultimately consummated by a lease.

The only remaining question to be discussed is, as to the effect of the law of May 14, 1845, upon the powers of the corporation, and as to the validity and operative character of that law. Assuming that that law is now in force, I am of opinion, that so far as it applies to future ferries, established after its passage, it is a valid exercise of legislative power. By its terms I do not understand it as applicable to existing ferries. The power granted to the city of New York by the Montgomerie charter to establish future ferries, is a *mere power* conferred upon the city, and not a *right of property*. It is a public or governmental power, whose exercise is inci-

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dent to and properly belongs to the sovereign authority. I doubt if the sovereign can alienate it beyond recall, inasmuch as the public welfare demands that it should reside in the legitimate representative of the whole people. If it be delegated or temporarily alienated, it may, I think, be resumed. So long as it remains unexecuted by the agent or delegate, it is revocable. It is not a grant of a property right, and so inviolable and indefeasible. But it is a delegation of authority for public purposes, and not for private emolument, and so the principal may retake it into his own hands. It confers no present rights of property; it vests no title to real estate, and I think it must be deemed to be accepted with the implied understanding that it is subject to recall, so long as it is not carried into execution. Though on its face exclusive, it does not mean exclusive of the donor, but of any other donee.

It follows, from these considerations, that if the law of 1845 has not been repealed by the act of 1857, it is valid and operative as to the two ferries which were granted or established after its passage. To that extent the provisions of the charter have been overruled by subsequent and paramount legislation. If that law is in force, the corporation of New York has no authority to lease the Hamilton avenue and Wall street ferries; and their attempt to do so, is a threatened exercise of illegal power, which, from its grave character and serious consequences, may be properly restrained by injunction. In arriving at this conclusion, I do not come in conflict with the decisions of Mr. Justice Barculo, in the case of *Benson v. The Mayor &c. of New York*, (10 Barb, 223,) for he abstained from deciding the question; nor, necessarily, with that of Mr. Justice Roosevelt, in the unreported case of *The Mayor &c. of New York v. Benson*, who is said to have decided in favor of an injunction restraining the defendants in that case from taking possession of and running the Fulton, South, Hamilton avenue and Wall street ferries. The defendants in that case justified or defended, under a single lease of these four ferries combined, and the decision may have been placed upon

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the ground that, as the defendants were attempting to assert rights as to the ferries under a lease or license, as to two of which, at least, it was invalid, they ought to be enjoined. It does not appear distinctly what the decision was, nor at all upon what grounds it was based, and I feel therefore at liberty to adopt my own conclusions.

But it appears to me that the act of 1845 was, by operation of law, repealed by the amended charter of 1857. These acts relate to the same subject matter, the ferries of New York, the former embracing the ferries to Long Island, the latter *all* the New York ferries, provide different and inconsistent modes of leasing or licensing the same, are both emanations of the same law-making power, and the *latest* expression of the legislative will must prevail. The act of 1845 contemplates a *licensing* of the ferries by *commissioners*, treating personally with the lessees, and not by a public sale, and an exercise of *discretion* on the part of the commissioners in the *selection* of the *licensees*, as well as in the *number* of ferries to be maintained; and the *places* where they shall be established. The act of 1857 is designed, I think, to establish a uniform and homogeneous system, applicable to *all* the ferries, and provides for a sale or *leasing* of all the ferries at *public auction* by the *city authorities* to the *highest bidder*. This is inconsistent with the exercise of the *discretion* and *judgment* of the commissioners required by the act of 1845. The machinery by which the results are accomplished is altogether different under these two systems, and I do not think they can stand together. By implication of law therefore, as well as by the express declaration of the 54th section of the act of 1857, which repeals all laws inconsistent therewith, (if it does not repeal large portions of the act of 1857 itself,) the act of 1845 must be deemed abrogated. It does not therefore stand in the way of the defendants.

The result is, that the motion for an injunction must be *denied*, and the temporary injunction heretofore issued must be *dissolved*; but as the question is of importance, and proper

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for review, the dissolution of the temporary injunction is not to take effect until ten days after the defendants have notice of the order entered upon this decision.

[COLUMBIA SPECIAL TERM, January 9, 1860. *Hogeboom*, Justice.]

In the matter of JERUSHA LAMOREE, a lunatic.

The appointment of a stranger to be committee of the person and estate of a lunatic, without the request of the relatives and next of kin of the lunatic, without an order of reference, and without notice to the persons having a prospective interest in the estate, is not authorized by the practice of the courts.

If the next of kin of a lunatic unite in a petition, and name a proper person as committee, or give their consent in writing to the appointment of a particular person, it is usual to select such person. But if the next of kin have not assented, or united in the petition, there should be an order of reference, and then the next of kin are entitled to notice of the proceedings upon the reference, and to propose themselves as the committee.

APPEAL from an order of the county court of Dutchess county, denying a motion for the appointment of a committee of Jerusha Lamoree, an alleged lunatic.

Wilber & Van Clief, for the appellant.

E. Crummev, for the respondent.

By the Court, BROWN, J. The papers read upon this motion, before the county court, afford ground for the belief that the proceedings upon the execution of the writ *de lunatico inquirendo* were not free from some irregularity, and if the principal fact which it was the object of the proceedings to establish and ascertain was left open to any doubt, it might be right to set them aside and institute a new inquiry, so that the mental condition of the person affected by them should be established positively and certainly. The lunacy of Je-

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rusha Lamoree is not, as I understand, disputed. Her relatives, and all others who know any thing of the state of her mind, concur with the jury in the opinion that she is a lunatic and incapable of managing her affairs, and unfit to govern herself. Under such circumstances, no good purpose could be served by vacating the proceedings prior to and including the filing and confirmation of the inquisition, and we are therefore of the opinion that the county court did right in denying that part of the motion.

The petitioner upon whose application the proceedings were instituted is Susan Van Wagner, and they were conducted, up to December 5th, 1859, by Tallman, Payne & Lord, as her attorneys. On that day, by a written consent to that effect, they ceased to act further in that capacity, and Wilber & Van Clief were substituted in their place.

A petition was prepared, signed and sworn to, by Susan Van Wagner, on the 24th of November, 1859, praying for the appointment of Alexander H. Vail, of Schodack, in the county of Rensselaer, and Robert Cookingham, of Hyde Park, Dutchess county, committee of the person and estate of the lunatic. Annexed to it was the written consent of her brother, George Smith, that they be appointed such committee. Cookingham, it appears, is nephew and one of the next of kin of the lunatic, and Alexander H. Vail is her brother-in-law. The time when this petition was presented, and the order consequent upon it obtained, is one of the points in dispute; the moving party alleging that it occurred after Tallman, Payne & Lord had been superseded in their office as the attorneys of the petitioner, and that it was on that account unauthorized and irregular; while the adverse side allege that it was presented and the order obtained for the appointment of the committee, on the 3d day of December, which is the day of the caption of the order. In the view I entertain of the case, the real time is of little consequence. The order is made upon reading and filing the inquisition, and also upon reading and filing the petition of Susan Van Wagner, and declares that

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Alfred Duer, of the town of Clinton, be appointed committee of the person and estate of the lunatic, upon giving the customary bond, in the penal sum of \$25,000.

The real complaint of the moving party is the making of this appointment, and I am constrained to say that the complaint is just; for the appointment of a stranger to execute a trust so delicate and of such responsibility without the request of the relatives and next of kin of the lunatic, without an order of reference, and without notice to the persons having a prospective interest in the estate, is not authorized by the practice of the courts having jurisdiction over such matters.

If the next of kin unite in a petition and name a proper person as committee, or give their consent in writing to the appointment of a particular person, it is usual to select such person. But if the next of kin have not consented, or united in the petition, there should be an order of reference, and then the next of kin are entitled to notice of the proceedings upon the reference, and to propose themselves as the committee.

In the matter of *Taylor, a lunatic*, (9 Paige, 611,) the chancellor held that it is not a matter of course to commit the guardianship of the estate of a lunatic to those who are presumptively entitled to it upon his death, as heirs or next of kin. But they will be appointed the committee of his estate when it satisfactorily appears to the court they are the persons most likely to protect his property from loss.

Blackstone, in his commentaries, (vol. 1, p. 305,) after saying that to prevent sinister practices "the next heir is seldom permitted to be the committee of the person, because it is his interest the party should die," also says: "But it hath been said there is not the same objection against his next of kin, provided he be not his heir, for it is his interest to preserve the lunatic's life, in order to increase the personal estate by savings, which he or his family may hereafter be entitled to enjoy. The heir is generally made the manager or committee of the estate, it being clearly his interest by good management to keep it in condition, accountable however to the court of chan-

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cery and to the *non compos* himself, if he recovers, or otherwise to his administrators."

In *Ex parte Le Heup*, (18 Ves. 221,) the master had approved of Mr. Benjafield, a stranger, committee of the estate, in preference to the lunatic's uncle and another who had been proposed, and both were unexceptionable. Lord Eldon sent back the report to be reconsidered, and said: "When strangers are appointed, they acquire an influence over the private and domestic concerns of a family, which ought always to be restricted if possible, within the circle of the family itself."

The law in dealing with the persons and estates of that unfortunate class who are bereft of reason and intelligence, proceeds upon principles which must commend themselves to the sanction and approbation of every humane and enlightened mind. Considering the close and intimate relations which the committee must maintain with the family and relatives of the lunatic, his power of control—all but absolute—over his person and property, the remote possibility of his ever being in a condition to make any disposition of his estate which shall prevent its descent and transmission to the heirs at law and next of kin, a rule of practice or of positive legislation which would justify the appointment of a stranger to execute the trust of committee, without the assent and against the will of his family or other relatives, and without any sufficient or adequate cause, would be oppressive and intolerable. It would be little less offensive than to deprive a person of his property without cause, and without the authority of law.

In respect to character, capacity and responsibility, we think Mr. Alfred Duel entirely unexceptionable. But he is a stranger to the lunatic; his name was not proposed by any of her relatives, or those interested in the protection and preservation of her estate. They had no opportunity to be heard, for there was no reference to which they could have been summoned.

The petition upon which the appointment was made prayed that to the nephew and brother-in-law of the lunatic might be committed the trust, and no reason is assigned or suggested

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why they were set aside and another selected. It was indeed suggested as an objection to Alexander H. Vail, that he was not a resident of the county of Dutchess, where the proceedings were had, and hence not amenable to the process of the county court. This objection is futile. He was a resident of the state, within the jurisdiction of its courts, and subject to their orders and judgments. In this, as in all other trusts of a similar kind, no more limited residence of the trustee is required.

In conclusion, we think the order appointing the committee was improvidently granted, and whenever it was brought to the notice of the county court it should have been vacated. So much of the order appealed from as denied the motion to set aside the proceedings subsequent to the filing of the inquiry, is reversed, and such proceedings are vacated and set aside, to the end that the petitioner, Susan Van Wagner, may have an opportunity to renew her application, for the appointment of a committee of the person and estate of the lunatic.

No costs of the appeal are given to either party.

[DUTCHESS GENERAL TERM, May 14, 1860. *Lott, Emott and Brown*, Justices.]

COX and WRIGHT vs. PLATT and others.

The fact that an assignee of property in trust for the benefit of creditors has fraudulently appropriated and converted property to his own use, and has misapplied large sums of money, the proceeds of the assigned property, furnishes a better reason for removing the assignee and appointing another trustee in his place, than for breaking up the assignment itself.

A postponement of certain debts, confessedly partnership debts, to others which are really individual debts, but are innocently or mistakenly supposed to be partnership debts, will not avoid an assignment made for the benefit of creditors.

It *seems* that a provision in an assignment, preferring individual debts, known to be such, over partnership debts, out of partnership property, if made without actual fraud, upon a mistaken supposition that the law sanctions such an appropriation of partnership property, will not make the whole as-

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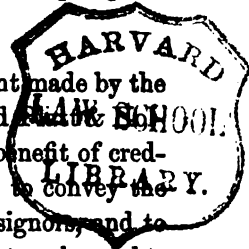
assignment void; though it might furnish occasion, in a proper case, for seeking the aid of a court of equity to prevent the misappropriation of the property, and enforce its distribution among the parties properly entitled to participate in it.

If an assignment is only partially objectionable, for making, to some extent, inequitable preferences, it will be only partially broken up, and then only in a way which shall enable the court to carry out the principle that equality is equity.

If, in such a case, a complaint is filed to set aside the assignment altogether, and not to carry it into effect, either in whole or in part; to break up the entire transaction, and not for an account and distribution of the assigned property; to satisfy the plaintiff's debt, alone, and not to divide the property equitably among all those having a claim to participate in it, the action cannot be sustained.

The appropriate remedy, under such circumstances, is, it seems, a suit in which all the partnership creditors shall be parties; or an action commenced as well for the benefit of the plaintiff as for such others, similarly situated, as choose to come in and make themselves parties thereto; or a suit for an account and distribution of the partnership funds, and avoiding illegal or inequitable preferences. If such there be.

ACTION to set aside, for fraud, an assignment made by the defendant Platt, in the names of Platt, and ~~Platt & Holroyd~~ ^{Platt & Holroyd}, to the defendant Brown, in trust for the benefit of creditors. The assignment, on its face, purported to convey the individual and partnership property of the assignors, and to prefer, in part, the individual debts of Platt to other debts owing by Platt & Holroyd. The plaintiffs sued as assignees of judgments obtained against Platt & Holroyd for partnership debts. The alleged fraud consisted: 1. In the alleged assignment, by one partner, without the assent of his copartner, of the entire partnership property to a trustee, for the payment of debts, giving some preferences over others. 2. In the alleged appropriation of partnership property, in part, to the payment of the individual debts of Platt, in preference to some of the debts of the partnership of Platt & Holroyd. 3. In providing for the payment of debts alleged to be fictitious and unreal. 4. In the fact that the assignee never executed, or assented to, the assignment. 5. In the fact that the assignee, being a non-resident, never took possession of



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the assigned property otherwise than through a resident agent, and has not personally attended to the execution of the trusts of the assignment, but has transacted the business through said agent. 6. In the fraudulent appropriation and conversion of property to his own use, and the fraudulent misapplication, by the assignee, of large sums of money, the proceeds of the assignment.

HOGANBOOM, J. As to the third, fourth and sixth grounds above mentioned, I think the plaintiffs' allegations are unsupported by the evidence; and the last named ground would afford a better reason for removing the assignee, and appointing another trustee in his place, than for breaking up the assignment itself.

As to the fifth ground, it seems to me that if it were true, as a question of fact, it would not of itself furnish a sufficient reason for setting aside the assignment, or even for removing the assignee. But I think the allegation as to the entire absence of any personal supervision and control of the assigned property, on the part of the assignee, is not unqualifiedly correct.

As to the first ground of alleged fraud above mentioned, the proof does not support the allegation of fact upon which the legal fraud is supposed to rest. Platt and Holroyd were not partners at the time of the assignment, and had not been such for about two months immediately preceding. The assignment was made in October, 1857. In August preceding, Holroyd had sold out to one Cheeseman his interest in the partnership property, and in September, 1857, Cheeseman had sold out to Platt his interest in so much of the partnership property as was attempted to be conveyed by the assignment. The whole legal interest in the property was vested in Platt; and it was not legally necessary for Platt to consult his former partner, Holroyd, as to the disposition of the partnership property, in order to make a lawful and effectual assignment thereof. As the supposed invalidity of the assignment, so far

as this ground of fraud is concerned, rests upon an erroneous assumption of fact, it is not necessary to be further considered.

The second is the only remaining ground of alleged fraud ; and without discussing the question whether one of two former partners, who has by successive changes of the interest of the other of said partners, become ultimately, in good faith, the sole owner of the partnership property, may not by assignment dispose of the same so as to give a preference to what were originally his own individual debts, I am not clear, upon the evidence in the case, that there was in fact any appropriation of partnership property to the payment of individual debts. There doubtless was an application of the partnership property, by means of the assignment, to the payment of debts, for which, or in the incurring of which, Platt's individual name or responsibility was alone given ; but Platt claims, and with some reason, upon the evidence, as to many of them, that all of these were in reality partnership debts or claims, for which the partnership was equitably liable, upon the ground that the moneys or property thus realized were used in the partnership business, or for the benefit of the partnership. I have not deemed it necessary to investigate this part of the case, so as to arrive at a final conclusion on this subject perfectly satisfactory to my own mind, because I have concluded that no actual fraud was intended by Platt, in reference to this matter ; that is, so far as he gave some debts a preference over others, he did not direct the appropriation of partnership property to the payment of debts which he did not suppose were either legally or equitably the debts of the partnership.

It appears from the assignment that in the introductory part of it not only Platt, and Platt & Holroyd, but James Holroyd are named as the assignors, but it never was, in fact, executed by the latter. It further appears that in one clause of the assignment the individual debts of Holroyd were preferred to some of the partnership debts. If this were inten-

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tional, it would be evidence of fraud ; but I think this clause was inserted by mistake, and under the expectation that Holroyd would unite in the assignment. As to the question previously considered, I am of opinion that, as a matter of law, a postponement of certain debts, confessedly partnership debts, to others, which are really individual debts, but are innocently or mistakenly supposed to be partnership debts, will not avoid an insolvent's assignment. The remedy is a different one. Indeed I think I might go further, and hold that a provision in an assignment, preferring individual debts, known to be such, over partnership debts, out of partnership property, if made without actual fraud, that is, upon a mistaken supposition that the law sanctioned such an appropriation of partnership property, would not make the whole assignment void ; though it might furnish occasion, in a proper case, for seeking the aid of this court in preventing the misappropriation of the property, and enforcing its distribution among the parties properly entitled to participate in it. Such a proper case is not presented in this suit. The complaint is not filed for such a purpose, nor with such an aspect ; and I incline to think, under the authorities, the action must in such case be brought so as to make all the partnership creditors parties, or expressly for the benefit, not only of the plaintiff, but of all the partnership creditors who will come in and contribute to the expenses of the litigation. In such a contingency, where the assignment is only partially objectionable, for making, to some extent, inequitable preferences, it is only partially broken up, and then only in a way which shall enable the court to carry out the principle that equality is equity. This complaint is filed to set aside the assignment altogether, and not to carry it into effect, either in whole or in part ; to break up the entire transaction, and not for an account and distribution of the assigned property ; to satisfy the plaintiffs' debt alone, and not to divide the property equitably among all those who have a fair and equal claim to participate in it. I am there-

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fore of opinion that the plaintiffs are not entitled to the relief which they seek in this action.

At the same time I am not satisfied that the action was commenced in bad faith, or without some reason to suppose, not merely that there was legal, but actual fraud, in the attempted disposition of the property in question. I am not inclined to charge the plaintiff with costs, or to give either of the parties costs, as against the others. The defendant Brown is entitled to his costs out of the funds in his hands, and the complaint must be dismissed, without prejudice to a suit in which all the partnership creditors shall be parties; or to a suit commenced as well for the benefit of the plaintiff as for such others, similarly situated, as choose to come in and make themselves parties thereto; or to a suit for an account and distribution of the partnership funds, and avoiding illegal or inequitable preferences, if such there be. If an injunction has been issued, it must be dissolved, and if a receiver has been appointed, the appointment must be vacated.

A decree or judgment must be entered in conformity with these suggestions, and may be settled upon two days' notice.

[NEW YORK SPECIAL TERM, May 7, 1860. *Hogboom*, Justice.]

THE PEOPLE ex rel. Alexander H. Van Rensselaer and others,
commissioners of highways of the town of Claverack, *vs.*
JAMES VAN ALSTYNE and others, referees &c.

In general, if not universally, the supervisory power of the supreme court over inferior tribunals, by means of the common law writ of certiorari, only extends to questions touching the *jurisdiction* of the subordinate tribunal, and the regularity of its proceedings. If such tribunal neither exceeds its powers, nor departs from the forms prescribed to it by law, its decisions upon the merits are final and conclusive.

The question of jurisdiction is open to review, on a writ of that nature; and so are the *facts* bearing upon the question of jurisdiction.

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The inferior tribunal may, and must, pass upon the facts touching its jurisdiction; but its decision is not conclusive. If the facts are the subject of dispute, they are to be submitted to the revisory judgment of the supreme court.

Hence, the evidence touching those facts must be returned upon certiorari, to the end that the supreme court may examine the same, and determine whether the inferior tribunal rightfully assumed jurisdiction, and whether it came to a right conclusion upon the facts which gave it the power to act. If a road, proposed to be laid out, and actually ordered by the commissioners of highways to be laid out as a public highway, can never become such, in consequence of its terminating in a private inclosure or a private way, it is a question which goes to the jurisdiction, and lies at the very foundation of the authority of the commissioners to act.

All evidence, therefore, tending to show the character of the latter way—whether it be private or public; whether it was applied for and was laid out as a private way; whether it has been used as such; whether it is closed at one end or not; and generally how and in what manner it has been laid out and used, must be regarded as legitimate evidence before the referees, upon a jurisdictional question, and properly reviewable on certiorari, directed to the referees.

On such a writ, evidence tending simply to show the benefit or utility of the proposed road; to what extent it is likely to be used by, and to serve the public; and how large a public is to be thus benefited, involves an inquiry simply as to the merits of the application, and the propriety of the road, and relates to questions as to which the decision of the referees is conclusive.

The court, therefore, will not compel the return of evidence of that character. Decisions of the referees, as to the admission or rejection of evidence bearing only on those questions, are not reviewable upon certiorari. They are questions upon which the decisions of the referees are conclusive.

The referees may be required to return whether the applicant, and other owners of land on the proposed route procured the certificate of the freeholders by offering to give the land, upon such proposed route, in case the road was laid out; or whether such offer was made *prior* to the making of the certificate of the freeholders, and was withdrawn afterwards.

MOTION on the part of the people and the relators to compel a further return by the referees to the writ of certiorari issued to them in this matter to return the proceedings had before them on the appeal of Peter H. Kipp from the decision of said commissioners refusing to lay out a certain highway in the town of Claverack in the county of Columbia, applied for by him. The referees reversed the decision of the commissioners and made an order laying out such highway.

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The commissioners, feeling aggrieved thereby, sued out a common law certiorari to reverse their proceedings, which was allowed ex parte at the Columbia special term in April, 1860. The referees made a return thereto, which the commissioners claimed to be insufficient and as not fully answering the requirements of the writ or of the law in such cases, and the latter, at the Albany general term in May, 1860, obtained ex parte an order for the referees to show cause at the June special term why they should not be compelled to make a further return. The referees now showed for cause that the writ was allowed ex parte, and that they had, as they claimed, made a return fully answering the requirements of the law. This return embraced all the preliminary proceedings up to the period when the application came on for hearing before the referees, upon the merits, their decision upon some points raised by the commissioners, and also their decision upon such application. On such hearing, the commissioners, in addition to other evidence and offers of evidence, offered to show that the proposed highway terminated, at one end thereof, in a private road, or what was claimed by them to be such; and also that the freeholders' certificate was obtained, or the making of it more or less affected, by an offer on the part of the applicant and other owners of land on the proposed route to give their land, which offer, it was proposed to be proved, was, subsequently to the making of the certificate, in some way modified or withdrawn. The commissioners also claimed that the referees erroneously admitted evidence tending to show that the proposed highway would be beneficial to citizens of the town of Ghent, as well as to the town of Claverack where the premises were situated. Other objections to evidence and offers of evidence were made by the commissioners and overruled by the referees. The respondent claimed that no part of the proceedings was to be returned, except such as related to the jurisdiction and regularity of action of the referees. The commissioners claimed that all their decisions on questions of law were reviewable.

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C. P. Collier, for the commissioners.

John Gaul, jun. for the referees.

By the Court, HOGEBROOM, J. A certiorari from the supreme court lies to redress injuries committed by inferior tribunals or officers invested with judicial powers. (*Lawton v. Commissioners of Cambridge*, 2 Caines, 179. *Le Roy v. Mayor &c. of New York*, 20 John. 430. *Wildy v. Washburn*, 16 id. 49. *Ex parte Mayor of Albany*, 23 Wend. 277.)

Sometimes it is expressly authorized and its limits defined by statute, and then of course the nature and extent of the power, and the cases in which it is to be exercised, depend mainly, if not entirely, upon the provisions of the statute. (*Matter of Wrigley*, 8 Wend. 134. *President and Trustees of Brooklyn v. Patchen*, Id. 47. *Roach v. Cosine*, 9 id. 227. *Rowan v. Lytle*, 11 id. 616. *Anderson v. Prindle*, 23 id. 616. *Niblo v. Post's Adm'rs*, 25 id. 280. *Buck v. Binniger*, 3 Barb. 391. *Morewood v. Hollister*, 2 Seld. 320.)

Sometimes there is no statutory regulation on the subject, and then the writ is denominated a *common law certiorari*. (*Johnson v. Moss*, 20 Wend. 145. *Comstock v. Porter*, 5 id. 98. *Kellogg v. Church*, 3 Denio, 228.)

In general, if not universally, the supervisory power of the supreme court over inferior tribunals, by means of this latter writ, only extends to questions touching the *jurisdiction* of the subordinate tribunal, and the *regularity* of its proceedings. If such tribunals neither exceed their powers nor depart from the forms prescribed to them by law, their decisions upon the merits are final and conclusive. (*Birdsall v. Phillips*, 17 Wend, 464. *Prindle v. Anderson*, 19 id. 391. *People v. Judges of Dutchess*, 23 id. 360.)

It will be seen from the above cases that even under such a limitation a considerable field remains for the exercise of the revisory power of the supreme court. It embraces all questions of *jurisdiction*—of power—of authority to act—all

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questions of *regularity* of proceeding; that is, all questions whether the inferior tribunal has kept within the boundaries prescribed for it by the express terms of the statute law, or by well settled adjudications of the common law.

Where, as is most generally the case, the inferior tribunal is one of special and limited jurisdiction, no presumption in favor of its jurisdiction arises, and it therefore must derive its power to act from facts affirmatively established. These facts must be made positively to appear, in the first instance; and not only so, but they are open to contestation afterwards; at least so long as the question remains before the same tribunal, and until that tribunal has definitively passed upon the question after hearing the parties and listening to such evidence, pertinent to that question, as they may choose to present. (*Striker v. Kelly*, 7 Hill, 24. *Harrington v. The People*, 6 Barb. 610. *People v. Cassels*, 5 Hill, 168. *Prosser v. Secor*, 5 Barb. 607. *People v. Comm'rs of Seward*, 27 id. 97.)

As this question is one of jurisdiction, it is open to review on a common law certiorari. And not only so, but the *facts* bearing on the question of jurisdiction are open to review. The inferior tribunal may and must pass upon the facts touching their jurisdiction, but their decision is not conclusive. Otherwise they may exercise arbitrary power, decide judicially that the case is within their jurisdiction, and bid defiance to the superior court. This I think was never intended; but that on the contrary where the facts constituting jurisdiction were the subject of dispute, they were to be submitted to the revisory judgment of the higher power.

Hence the evidence touching those facts must be returned upon certiorari, to the end that this court may examine the same, and determine whether the inferior tribunal rightfully assumed jurisdiction, and whether it came to a right conclusion upon the facts which gave it the power to act. (*People v. Goodwin*, 1 Selden, 572.)

A certiorari lies to the judges of the common pleas (for whom referees appointed by the county court have now been substi-

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tuted,) to remove proceedings on an appeal to them from commissioners of highways. (*Lawton v. Com'rs of Cambridge*, 2 *Caines*, 179. *Com'rs of Kinderhook v. Claw*, 15 *John*. 537. *Allyn v. Com'rs of Schodack*, 19 *Wend.* 342. *People v. Goodwin*, 1 *Selden*, 568.)

Among the questions of jurisdiction thus subject to review is the question whether the owner of enclosed, improved or cultivated land through which a highway has been laid has given his consent thereto; (*People v. Goodwin*, 1 *Seld.* 568;) also the question whether the persons making the certificate of its necessity were freeholders; (*People v. Com'rs of Seward*, 27 *Barb.* 94;) also the question whether they were twelve in number; (*Town of Gallatin v. Loucks*, 21 *Barb.* 578;) also the question whether the highway was laid out through the yard or garden of the owner without his consent. (*Ex parte Clapper*, 3 *Hill*, 458;) or though an orchard. (*People v. Com'rs of Dutchess*, 23 *Wend.* 360.)

It is obvious, also, that the question whether the road when laid out in pursuance of the application, will become a *public highway*, is a jurisdictional one. The commissioners have no authority (except where the application is for a *private* road) to lay out a road, except for the use of the public. Suppose the application should be for a road commencing and terminating at points in a cultivated field without outlets or means of egress at either end, or in a trackless forest; or bounded at the respective termini by rocks or other impassable barriers; could such a road, when laid out, with propriety be termed a *public highway*? At all events, would it not be a jurisdictional question whether it was so or not, and fit for review on the evidence, upon certiorari? This court has decided, in *Holdane v. Trustees of Cold Spring*, (23 *Barb.* 115,) that a road closed at one end, or a road not communicating at one end with some public road or means of egress of which the public have a right to avail themselves, is not a public highway, and cannot be made such by user. This decision has just been affirmed in the court of appeals, and if affirmed

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upon this ground, must be regarded as the established law. If therefore the road proposed in this case to be laid out and actually ordered to be laid out as a public highway, can never become such in consequence of its terminating in a private enclosure or a private way, it is a question which goes to the jurisdiction, and lies at the very foundation of the authority of the commissioners to act. All evidence, therefore, tending to show the character of this latter way, whether it be private or public; whether it was applied for and was laid out as a private way; whether it has been used as such; whether it is closed at one end or not; and generally how and in what manner it has been laid out and used, must be regarded as legitimate evidence before the referees, upon a jurisdictional question, and probably reviewable on certiorari.

I am inclined to think that evidence tending simply to show the benefit or utility of the proposed road; to what extent it is likely to be used by, and to serve the public; and how *large* a public is to be thus benefited or accommodated, involves an inquiry simply as to the merits of the application and the propriety of the road, and relates to questions as to which the decision of the referees is conclusive and not reviewable; and that therefore we ought not to compel the return of evidence bearing only on such questions. (*Haviland v. White*, 7 How. 154. *People v. Duell*, 16 *id.* 43. *People v. Goodwin*, 1 *Sel.* 568. *People v. Overseers of Barton*, 6 How. 26. *People v. Overseers of Ontario*, 15 *Barb.* 286.)

I am also inclined to think that decisions of the referees as to the admission or rejection of evidence bearing only on those questions are not reviewable upon certiorari. They are questions upon which the decisions of the referees are conclusive. They are questions not subject to review in this court. (*See cases last cited.*) It may indeed be that if the referees could be shown to have based their conclusions *entirely* upon illegal considerations, for example, if they located the road entirely outside of the route of the proposed highway; or if they refused to lay out the highway *simply* because the applicants

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would not waive their claim to damages; or would not consent to be subjected to the entire expense, regarding the application in itself as meritorious and the road imperatively demanded by the public convenience; or if they decided to lay out the highway *solely* upon considerations of the benefit or accommodation it would furnish to a single applicant, and wholly uninfluenced by any conviction of its public necessity or utility, I am not prepared to say that their action in this respect would not be the subject of review in this court; nor indeed that this would not present a question of jurisdiction or of regularity. It will be time enough to decide these latter questions when they arise.

The principles above announced, applied to the present case, make the disposition of it, in most particulars, not difficult. The referees must make a further return which shall contain the evidence and the offers of evidence and their decisions thereon, in regard to the southern point or place of termination of the proposed highway; whether such terminus was in a private inclosure or in a private way; whether the road now in use from the house of Jordan Philip to the public highway leading to Mellenville is itself a public highway or a private road; what are its length, breadth and dimensions; whether it was originally applied for, laid out and recorded as a public or private way, and how it has been, in fact, used and travelled and worked; and all evidence, offers of evidence and decisions tending to throw light on these questions.

Also, such further return must contain the evidence, offers of evidence and decisions upon the questions, or tending to throw light upon the questions, whether the applicant and other owners of land on the proposed route procured the certificate of the freeholders by offering to give the land upon such proposed route in case the road was laid out; or whether such offer was made *prior* to the making of the certificate of the freeholders, and either wholly or partially withdrawn afterwards.

There may be some further matters proper to be embraced

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in the further return, where the matter asked to be returned can have any possible influence upon the questions to be considered in the court of review, or are not clearly improper subjects for the consideration of that court, the referees should return the same, and as just and impartial men, having no feeling or bias between the parties, should have no hesitation in doing so. It is better that all matters upon which there can be a possible ground for debate, should be presented in the return, so as to give the court an opportunity to consider the same; and I reserve the expression of any conclusive opinion thereon until the final argument upon the completed return. An order must be prepared in conformity with this decision; and if the parties cannot agree upon the same, it may be settled upon two days' notice.

[ALBANY SPECIAL TERM, June 26, 1860. *Hogeboom*, Justice.]

 VAN ALLEN vs. FELTZ.

The meaning of the 78d section of the code, in declaring that the title relative to the time of commencing actions should not extend to actions already commenced, or to "cases where the *right of action* had already accrued," was to except from the operation of the section (110) requiring the new promise or acknowledgment to be in writing, only those cases where an action had been already commenced, or should be thereafter commenced, upon a then existing and effective cause of action, which should, of itself, and without the aid of any subsequent promise or acknowledgment, be sufficient to support the action.

It is the new promise or acknowledgment, which gives vitality to the cause of action, and it forms the substance of the right of action prosecuted.

Hence, when a promise or acknowledgment, made before the statute of limitations had run, but since the code took effect, is relied on as taking the case out of the statute of limitations, it must be in writing.

ACTION tried at the Columbia circuit, in September, 1857, before Justice D. WRIGHT, without a jury. The judge, after consideration, gave judgment for the defendant, from

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which judgment this appeal was taken by the plaintiff. The question involved arose upon the statute of limitations. The Messrs. Bulkley, (attorneys and counsellors at law,) on the 18th of April, 1846, recovered a judgment against the defendant, before a justice of the peace, for \$101.15, and also another judgment, for \$76.15; and on the 31st of March, 1856, assigned them to the plaintiff in this action; who commenced this suit, for the recovery of the amount due thereon, on the 10th day of July, 1856. Previous to the assignment to the plaintiff, and before the statute of limitations had run against the judgments, and in June, 1852, and also before that time, the defendant verbally promised the plaintiffs in the judgments, who were then the owners thereof, to pay them. The question was, whether a verbal promise was sufficient to take the case out of the statute of limitations.

George W. Bulkley, for the appellant.

C. B. Cochran, for the respondent.

By the Court, HOGEBOM, J. By section 110 of the code, as read in connection with section 73, it is provided that no acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take a case out of the operation of the statute of limitations, unless the same be contained in some writing signed by the party to be charged thereby; but that this provision shall not extend to actions commenced, or to cases where the right of action had accrued when the code took effect, (1848;) but that the statutes then in force should be applicable to such cases, according to the subject of the action, and without regard to the form. The excepted cases would seem to be pretty clearly specified by this language; and yet it was not long before a case arose calling for judicial construction. It arose upon the proper interpretation to be put upon the following language: "cases where the right of action had already accrued." Cases where

the statute of limitations had already attached, were in one sense cases where the right of action had already, that is *therefore*, accrued. But no difficulty arose as to these, because they were put at rest (unless there was some new promise or acknowledgment,) both by the old and the new statutes. But the difficulty arose as to cases: 1. When, at the time the code took effect, the statute of limitations had attached, but there was an acknowledgment or promise afterwards; and 2. When, at the time the code took effect, the limitation had not yet attached, but would have attached before the action was commenced, but for an intervening promise or acknowledgment. The question was, whether in these two latter cases the promise or acknowledgment must be in writing; that is, whether the code operated upon it, or it did not. As to the *first* class above mentioned, the cases of *Wadsworth v. Thomas*, (7 Barb. 445,) and *Esselstyne v. Weeks*, (2 Kern. 635,) are directly applicable, and they hold that in such cases the rule of the code governs, and that the promise or acknowledgment must be in writing. They are put upon the ground that, when the code took effect, the statute had already attached, and that in no just sense could it be said of them that the causes of action had already accrued; that the effective cause of action, and that upon which the plaintiff must rely for a recovery, was the subsequent promise or acknowledgment; and hence that such cases did not, according to the spirit, and scarcely according to the letter of the statute, come within the exception before named. But in the other class of cases, where the statute of limitations had not attached, and of course where there was an existing cause of action at the time the code took effect, there is more difficulty. They present, unquestionably, cases where a right of action had already accrued; and the question is, whether it is *the* right of action to which the exception refers. The reasoning of the cases above referred to, comprehends this latter class of actions; for it is contended, and with much apparent reason, that the right of action referred to, means the right of action which is *pro-*

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ecuted, and not one which, although existing when the code took effect, is permitted to die, or become extinguished, without being enforced. And it is claimed that the code meant to establish one uniform rule of evidence for the future ; that is, when the party, in order to sustain his action, was obliged to rely upon a promise or acknowledgment made since the code, it must have one uniform characteristic ; that is, it must be in writing. And I think this, on the whole, the sounder construction. Against this construction it is urged, with some plausibility, that the cause of action prosecuted is, in all cases, the *original* cause of action, and that the subsequent promise or acknowledgment is only used to sustain or continue the original cause of action. This view is supported by several adjudged cases. But after all we cannot but see that it is the new promise or acknowledgment which gives vitality to the cause of action, without which it could not exist ; and that it forms the substance of the right of action prosecuted. And we ought therefore, I think, for the purpose of giving a construction to this section, to look at the object and spirit of the enactment, and not to the mere letter of it. It may be technically true that the right of action had accrued when the code took effect. But the meaning of the code is, I think, to except from the operation of the section requiring the new promise or acknowledgment to be in writing, only those cases where an action had been already commenced, or should be thereafter commenced, upon a then existing and effective cause of action, which should, of itself, and without the aid of any subsequent promise or acknowledgment, be sufficient to support the action.

I am embarrassed, however, in giving effect to these views, in the present case, by the course of adjudication which has been had in this court, on the effect of this statute. The decision of the court of appeals in *Esselestyne v. Weeks* cannot be considered as controlling authority beyond the range of the facts involved in that case ; and that was a case where the statute of limitations had attached prior to the code. On the

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other hand, there are several decisions in this court to the effect that where a right of action had already accrued at the time the code took effect, a subsequent promise or acknowledgment to renew or continue the same need not be in writing. (*Gillespie v. Rosekrantz*, 20 Barb. 35. *Glen Cove Mutual Ins. Co. v. Harold*, *Id.* 298. *Winchell v. Bowman*, 21 *id.* 448.) The cases, also, in this court, are numerous to the effect that where a demand is barred by the statute of limitations, and revived by a new promise or acknowledgment, the right of action is founded upon the original demand, and not upon the new promise or acknowledgment; the latter operating only to remove the presumption of payment arising from the lapse of time. (*Soulden v. Van Rensselaer*, 9 Wend. 297. *McCrea v. Purmort*, 16 *id.* 477. *Watkins v. Stevens*, 4 Barb. 168. *Carshore v. Huyck*, 6 *id.* 583. *Philips v. Peters*, 21 *id.* 358, and cases there cited. *Winchell v. Bowman*, 21 Barb. 451.) If this be so, it can be argued with great force, not only that in a case like this, the right of action had accrued when the code took effect, but was continued, and remained a subsisting cause of action at the time this action was commenced, and that the only effect of the subsequent promise or acknowledgment was to awake the original cause of action theretofore dormant, but not dead. I have expressed my doubts whether this was the true interpretation of the provisions of the code already referred to, but should be inclined, on the whole, to yield to the weight of authority, and to leave it to the court of appeals, if they think proper, to overrule the construction which this court seems pretty uniformly to have put upon this statute, were I not satisfied from the opinion of this court in *Wadsworth v. Thomas*, (7 Barb. 445,) that there is a difference of opinion in the supreme court on the subject, and from the opinions of the court of appeals in *Esselstyne v. Weeks*, (2 Kern. 635,) that they would ultimately adopt the view of the statute therein expressed, as the authoritative exposition of the law. As this also accords with our own construction of the statute, independent of authority, and will probably

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save expense to the parties, we think the appropriate disposition to be made of this case is that the judgment therein should be affirmed.

Judgment accordingly.

[ALBANY GENERAL TERM, May 2, 1859. *Gould, Hogeboom and Sutherland, Justices.*]

McGRATH, adm'r &c. vs. THE HUDSON RIVER RAIL ROAD COMPANY

In an action for damages arising from negligence, the plaintiff must prove the defendant's negligence, and his own freedom from any negligence contributing to the injury.

The facts may be so clear and decided that the inference of negligence is irresistible; but where either the facts, or the inference to be drawn from them, are in any degree doubtful, it is the duty of the judge to submit the whole matter to the jury, under proper instructions as to the law.

Where, in an action by an administrator, against a rail road company, for causing the death of the plaintiff's intestate by negligence, the court nonsuited the plaintiff, on account of the negligence of the deceased, contributing to the injury, and refused to submit the question as to such negligence, to the jury; thereby substantially holding that a verdict for the plaintiff would be set aside as unwarranted by the evidence; *it was held* that such decision was erroneous, and a new trial was granted. GOULD, J. dissented. Such a disposition of the case can only be sustained upon the ground that there is no aspect in which the case can be considered which will justify a verdict for the plaintiff.

While it is the established law that a party whose negligence contributed to the injury cannot recover damages therefor, this rule, which does not allow the jury to weigh the comparative negligence of the litigating parties, should not be extended so far as to take from the jury the right to determine (except in a very clear and certain case) whether such negligence has in fact been committed. Per HOGEBOOM, J.

Inasmuch as the law does not require, of persons passing on or over a public street or thoroughfare, extreme care or very exact diligence, though a rail road may cross it on the same surface, it does not deprive a party injured of redress, although he was guilty of *slight neglect* which contributed to the injury. Per PROCKHAM, J.

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ACTION brought by the plaintiff as administrator of Mary McGrath, deceased, under the act of December 13, 1847, requiring compensation for causing death by wrongful act, neglect or default, as amended in 1849, (*Laws of 1847, ch. 450; Laws of 1849, ch. 256,*) to recover damages for the death of the plaintiff's intestate, a little girl about twelve years of age, alleged to have been caused by the negligence and improper conduct of the defendant and its agents. The action was tried at the Rensselaer circuit, in February, 1857, before Justice GOULD and a jury.

The evidence showed that in June, 1855, the deceased was killed by the cars of the defendant, at the city of Troy, while she was in the act of passing, on foot, the rail road crossing over Fourth street. At that point the defendant had two tracks, upon one of which, at the time of the injury, a train was passing rapidly south, and one, upon the other and east track, was slowly backing north. The deceased was traveling from the south, on the east side of Fourth street, and as the down train passed had reached the middle of the east track when struck by the backing train, and killed. No whistle was blown, or bell rung, upon the backing train. The bell on the down train was rung. The flagman was on the west side of the track, the flag-house being on the east side. At the time of the accident, a man was standing on the rear platform of the backing train, but was not at the brake, which was on the east side of the platform, he being on the west side and looking west. The occurrence took place in the south part of the city of Troy, just at the point where the union rail road leaves Fourth street, passing towards Hill street. It happened about 9 o'clock in the forenoon, the weather being fine and clear. This road has a double track, and just before, a train of cars passed down (south) on the west track, while the train that ran over the girl was being backed up (north) on the east track. The backing train was going slower than an ordinary walk. There was, at the time, a man standing on the platform of the cars, but not at the brake. He was at the

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west side of the platform, and the brake at the east. Only two witnesses were sworn who saw the girl before the occurrence, Nicholas Mahan and Stephen Myers.

Mahan testified: "I first saw the girl after the train on the west track had passed down—had passed me. She was then coming up Fourth street; she was pretty near the flag-house—a little beyond the flag-house, towards the track; she was on the track when I first saw her; she was facing up street; the backing train was within two or three feet of her; I thought she was almost on the rail—so near the rail that she was just stepping on to it; the girl was off the track—outside the track, when she was hit; the cars hit her and tumbled her on to the track. I was about twelve yards from her, when she was hit; may be more; I went up to the girl; she was alive when taken from under the cars; was dead when I left."

Myers testified: "I was on Fourth street, east side of the track, when I first saw the girl; I was, I should think, between three and four feet from her; she was on the track between the two rails; the cars were between three and four feet of her; I was passing in the same direction she was; I observed the train that was backing up; I had got within three or four feet of it when I observed it; I saw the cars and the girl on the track at about the same time; the girl and I were on the east side of Fourth street; the girl was killed opposite the east sidewalk (Fourth street,) within the rail road track. The gore west of Fourth street is open, no buildings on it; I saw the girl take two steps; she raised her foot and put it down and raised it again; she *appeared to be walking west towards the train going down*. I did not see any thing of the girl until about the instant she was struck; I did not see the cars until about the instant they struck her."

Upon this testimony the judge nonsuited the plaintiff, upon the ground "that the evidence showed the deceased was guilty of negligence which contributed to her death," and refused to allow that question, or any of the questions of fact to be sub-

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mitted to the jury. The plaintiff excepted, and the case now came before the court upon the exceptions thus taken.

W. A. Beach, for the plaintiff.

T. M. North, for the defendant.

HOGEBOM, J. In actions for damages arising from negligence the plaintiff must prove the defendant's negligence, and the plaintiff's freedom from any negligence contributing to the injury. In this case, the judge, without deciding the question of the defendant's negligence, nonsuited the plaintiff on account of negligence on the part of the child. He refused to submit the question to the jury as to the latter point, therefore substantially holding that a verdict for the plaintiff would have been set aside as unwarranted by the evidence.

What constitutes negligence is often, perhaps generally, a difficult question to decide. It is determined, for the purposes of a court and jury, by an inference of the mind from the facts of the case; and as minds are differently constituted, the inferences from a given state of facts will not always be the same. The facts may be so clear and decided that the inference of negligence is irresistible; but where either the facts or the inference to be drawn from them are in any degree doubtful, the better way is to submit the whole matter to a jury, under proper instructions as to the law. This is the more necessary, in cases of negligence, because of the great variety of considerations which enter into that question. The difficulty is increased by the fact that negligence is of different degrees, and because the fact whether negligence is slight, ordinary or gross, depends upon the peculiar circumstances of each case. The same facts might constitute great negligence in one case, which would scarcely amount to slight negligence in another.

Again; negligence, which is nothing more than the want of care—proper care—is more or less affected by the conduct or action of the opposing party. It is not always negligence to cross a rail road track at times when a train is not due or

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cannot be reasonably expected to pass; nor to cross a rail road track without looking for a train, when no signal of its approach is given, by the ringing of a bell or otherwise. It may not be negligence, that is, a degree of negligence which shall deprive a party of damages, to cross a rail road track immediately after a train has rapidly passed with much noise and ringing of bells, although another train, giving no signal of its approach, may be noiselessly approaching from an opposite direction on a contiguous and parallel track.

Whether such conduct is negligence, in this particular case, must depend upon a consideration of all the circumstances, and is a conclusion to be deduced from a careful and prudent examination of all the facts, and the legitimate inferences to be drawn therefrom. Ordinarily, therefore, it should be left to a jury to determine, and their determination, when founded upon conflicting evidence, or upon the uncertain deductions to be derived from particular facts, more or less clearly established, cannot generally be disturbed.

In this case I am of opinion that if the noise and ringing of bells, attending the descending train passing rapidly across a public thoroughfare was so great as not only naturally to attract the attention of a person of ordinary caution, approaching from a nearly opposite direction, but naturally to make such person unaware of the approach of a train coming with very little noise from an opposite direction and giving no signal of its approach, an injury inflicted by the latter train is not the result of negligence practised by the party receiving the injury, in such a sense as deprives him, or his representatives, of an action for the same.

The greatest caution is very properly required of those who propel engines having such vast power of mischief; and while it is the established law that a party whose negligence contributed to the injury cannot recover, this rule which does not allow the jury to weigh the comparative negligence of the litigating parties, should not be extended so far as to take from the jury the right to determine (except in a very clear

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and certain case) whether such negligence has in fact been committed.

The facts presented in this case seem to me of such a character as to require their submission to a jury, upon the demand of either party. Assuming that the deceased is to be held to the same degree of care which is demanded of an adult person, the girl was rightfully on the street; she had a right to cross the rail road track; she was obliged to do so, if her business led her north. A train was just passing to the south with rapidity, the bell ringing and the whistle sounding. It naturally and reasonably attracted her attention. It was possible, though not probable, that nearly at the same moment another train should pass in the opposite direction. It was not proper, but negligent, on the part of the defendant, to allow it so to pass without signalizing its approach. It was reasonable to expect that such warning and notice would be given. If it was not given, I think it was reasonable and prudent to conclude that no other train was approaching, and consequently that there would be no danger in crossing the track. It may be true that extraordinary caution would have demanded that the girl should have looked to the south, as well as to the north and west. I cannot say that it was such negligence not to do so as should defeat the action, if the backing train was proceeding so noiselessly as not naturally to have excited the attention of a prudent person.

I am therefore of opinion that a new trial should be granted, unless there are some adjudications which settle the rule in a contrary direction.

I do not discover, in any of the cases to which reference has been made, any adjudication which forbids the granting of a new trial in this case. The cases unquestionably hold that a nonsuit may be granted in cases of this character, as in other cases, where the proof is insufficient to maintain the cause of action; that clear proof of negligence on the part of the plaintiff entitles the defendant to demand a nonsuit; that where the facts are undisputed, and the inferences to be drawn from

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them clear, and leading only to a single result, the question becomes one of law for a court to determine; that where there is full opportunity for observation, and abundant means for avoiding a collision, such as would occur to, and be embraced by, a person of ordinary prudence, the plaintiff is negligent for not embracing them; and that the plaintiff is not relieved from the imputation of negligence unless his conduct is deprived of that character by the defendant's own act or default.

Nevertheless, there are cases so nearly balanced, both as to the facts, and as to the inferences to be derived from them, that a court cannot safely, against the objection of a party, remove them from the consideration of the triers of questions of fact; and when such a course is taken against the will of a party, it can only be sustained upon the ground that there is no aspect of the case in which it can be considered, which would justify a verdict for the plaintiff. I do not regard this case as of that character, and am therefore of opinion that the nonsuit should be set aside, and a new trial should be granted, with costs to abide the event.

PECKHAM, J. (After stating the facts.) Only one ground was presented for a nonsuit; and it is not therefore material to consider any other. The sole point here is, did the evidence so clearly prove the deceased guilty of negligence contributing to her injury that as matter of mere law the court should so decide; or was the case on that subject of such a character as to require its submission to a jury? The doctrine is laid down in general terms, that to sustain this action it must appear that the negligence of the defendants alone caused the injury. If the negligence of the deceased contributed, the action cannot be maintained.

What is meant of negligence of the party injured contributing to the injury, in such a case? There are different degrees of negligence or care, known to the law. In speaking of the various degrees of care or diligence, Sir William Jones

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says, "there are infinite shades from the slightest momentary thought or glance of attention to the most vigilant anxiety and solicitude." Again, he says: "The care which every man of common prudence takes of *his own* concerns, is a proper measure to be required in performing every contract, if there were not strong reasons for *exacting* in some of them a *greater* and *permitting* in others a *less* degree of attention." If the construction be *favorable*, a degree of care less than the standard will be sufficient; if *rigorous*, a degree more will be required." (*Jones on Bail.* 5, 6. *Ang. on Law of Carriers*, § 6.)

The civil and common law make three degrees of negligence.

1. Gross—which consists, according to Sir W. Jones, in the omission of that care which even inattentive and thoughtless men never fail to take of their own property. This is regarded as equal to fraud or bad faith. 2. Ordinary neglect. The want of that diligence which the generality of mankind use in their own concerns, that is, of ordinary care. 3. Slight neglect. The omission of that care which very attentive and vigilant persons take of their own goods, or of very exact diligence. (*Jones*, 21, 22. *Ang. on Carr.* §§ 5, 10.)

If the party injured be bound to exercise the greatest care, then no case can be found where an action could be maintained. I think the past has furnished no exception to this position, not even where the rail road is on the same surface with a public road and occupying a part of it, either for the purpose of crossing or otherwise. If he had looked the other way, or thoroughly in all directions; had gone a little faster or a little slower; if he had stopped and made inquiry as to when the cars were coming to cross the track, he had not been killed. To require the strictest care from them would afford no practical protection to the public, and would of course give encouragement and impunity to negligence by the rail road companies. While it is important to foster commerce and facilitate intercommunication, there is no reason why either should be done at the expense of human life. I am not aware that it has ever been adjudged, by any court, that extreme

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diligence, or in the language of Sir William Jones, "very exact diligence," can be required of persons passing on or over a public street or thoroughfare, though a rail road may cross it on the same surface.

As the law does not then exact extreme care, it does not deprive the party injured of redress, though he was guilty of slight neglect, which is the absence of extreme care, and though that slight neglect contributed to the injury. The rule is stated almost in these terms by Harris, J. He says: "Where the negligence of the defendant is proximate, and that of the plaintiff remote, the action may be sustained." (*Button v. The Hudson River Rail Road*, 18 *N. York Rep.* 258.) That a person is required to exercise only ordinary care to avoid injury, in these cases, would seem to be established, if authority can establish any thing. I shall not refer to the decisions laid down. It is a rule as to diligence that the party must proportion his care to the injury likely to accrue to others by any improvidence on his part. "Where the consequence of negligence will probably be serious injury to others, and where the means of avoiding it are completely within the party's power, ordinary care requires almost the utmost degree of human vigilance and foresight." (*Per Johnson, J. Kelsey v. Barney*, 2 *Kern.* 429, 30.) This is a sound rule—healthful in its practical application. People in this country, in passing over public roads or streets crossed by rail roads, will bestow about so much attention. They desire to save their limbs and lives, and a book filled with statutes of pains and penalties, or disabilities, will not add a particle to their care or precaution. If the loss of life will not secure caution, forfeiture of property, or imprisonment, for having their limbs broken, will be wholly ineffectual. The only way to protect them is to exact great diligence from those who manage and control these powerful and terrible steam engines on rail roads. They are capable of avoiding and preventing injuries to persons in such cases, and it is their business—their special business—to do so. In no country but this are rail roads

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allowed, as a general thing, to cross streets or public highways with cars propelled by steam, upon the same surface with the street or highway. In every excepted case the crossing place is guarded with a vigilance never exhibited here. If rail road companies here choose to cross streets upon the same surface, they assume a corresponding responsibility, and must exert a corresponding vigilance. It being the peculiar business of the managers of these steam engines, in view of these increased perils to persons lawfully traveling the streets or highways, to be extremely careful not to injure them, they will not be allowed to neglect their business: they must not be inattentive or absent minded. Human beings, especially in this country, intent upon and absorbed with their business, their cares, their griefs or their pleasures, are not always mindful of the perils of these crossings: they are absent minded, sometimes, and they cannot be made otherwise; the mind is legitimately engaged on something else. The law then looks to them with more toleration, and "permits in them a less degree of attention." In the language of Sir William Jones, before referred to, "the construction of their conduct is favorable, and a degree of care from them less than the standard will be sufficient." They imperil nothing but their lives. If they run against a steam engine, there is little danger of their injuring it. The great number of lives sacrificed at these crossings should warn courts to be careful, before adjudging as matter of law that their negligence was such as justly to forfeit their lives. The care exerted was such as they thought sufficient; such as they trusted their lives upon, and this gave the highest evidence of their sincerity. In some states, in this country, where rail roads cross each other, statutes have been passed requiring each train to make a full stop as it comes to such crossing, before passing over. That, in the judgment of such legislature, is the measure of care which such a case demands. In my judgment our courts have gone quite far enough, in the direction of holding persons injured to be free from negligence, before they can recover. Both

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principle and sound public policy forbid any extension of the doctrine. It would certainly encourage and promote negligence on the part of the rail road employees. Feeling that any want of care by the injured would secure impunity to them, and knowing that no man was ever yet injured at a crossing, to whom some want of care could not be imputed, they would naturally and necessarily relax from that keen vigilance imperatively required from persons in their position. Its extension would secure no greater caution on the part of the public.

I have examined the testimony in this case with some care, and I am clearly of opinion it was not a case for a nonsuit, on the question of the negligence of the deceased. A train had just passed down with speed and much noise, and in a manner well calculated to attract the attention of the deceased, and she would then quite naturally think the track was clear, and not be looking for another train immediately. She was no trespasser, was walking where she had a legal right to go, in a public street ; and this train stealthily, without ringing a bell or giving any notice, approached her, under circumstances well calculated to avoid her observation. Her course was northerly, and the train east of north, but not northeast, almost at her back. In my judgment, this was a proper case for a jury. Questions of fraud and negligence are peculiarly for them, under proper instructions from the court. Such cases have been so regarded by elementary writers. "All the preceding rules may be diversified to infinity by the circumstances of every particular case, on which circumstances, it is on the continent, the province of a judge appointed by the sovereign, and in England of a jury, finally to decide." (*Jones on Bailment*, 122 ; repeated with approbation in *Ang. on Carriers*, § 16.) Story, J. says : "What is common or ordinary diligence is more a matter of fact than of law." "And in every community it must be judged of by the actual state of society, the habits of business, the general usages of life, and the dangers as well as the institutions peculiar to the age.

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(*Story on Bailm.* § 11.) Judge Johnson says, in the court of appeals, on this subject: "It by no means follows, because there is no conflict in the testimony, that the court is to decide the issue as a question of law. The fact of negligence is very seldom established by such direct and positive evidence that it can be taken from the jury and pronounced upon as matter of law." (*Ireland v. Plank Road Co.*, 3 Kern. 533.) In Connecticut it is held that negligence is so peculiarly a question of fact that it should be left to the jury, even on a conceded state of facts. (19 Conn. Rep. 566. *Been v. Housatonic R. R. Co.*, 2 *Smith & Bates' Am. Rail. Cases*, 114. See also *Oldfield v. New York and Harlem R. R. Co.*, 14 N. Y. Rep. 310, a case in many aspects similar to this; *Hegan v. 8th Avenue R. R. Co.*, 15 N. Y. Rep. 380, *opinion of Paige, J.*; and see *Carlton v. Bath*, 2 *Foster*, 559; *Whitney v. Lee*, 8 Met. 93.)

It was insisted at the bar that the defendant was guilty in this case of gross negligence, and therefore that the plaintiff was entitled to recover, though the deceased was guilty of ordinary negligence. As the facts were presented at the circuit without hearing the defendant's evidence, there is perhaps some ground to claim that there was evidence of gross negligence in the defendants' agents. I do not propose to examine this point at length. In such a case there are many dicta, and some authorities, favoring the position of the plaintiff's counsel. (*Rathbun v. Payne*, 19 Wend. 401. *Hartfield v. Roper*, 21 id. 615, 19. *Trow v. Vermont Central R. R. Co.*, 24 Verm. B. 487. *Kenoharker v. The Cleveland, Toledo and Cincinnati R. R. Co.* 3 Ohio Rep. 172.) Selden, J. says: "What is gross negligence depends upon the particular circumstances of each case." (*Nolton v. The Western R. R. Co.* 15 N. Y. Rep. 449.)

In ordinary cases, negligence, even when gross, is but an omission of duty. It is held, contrary to the text of Sir Wm. Jones, that it is not designed or intentional mischief, though it may be cogent evidence of it. (*Story on Bail.* §§ 19, 22.

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Gardner v. Heartt, 3 Den. 236.) But in cases where human life is put in jeopardy, any negligence has been held to be gross. Per Curtis, J. in delivering the opinion of the court: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence." "And whether the consideration be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance, or the negligence of servants. Any negligence in such cases may well deserve the epithet of gross." (16 How. U. S. Rep. 469, 474; and see cases there cited of gross negligence; also the cases referred to by Selden, J. in 15 N. Y. Rep. 449.) Is not human life just as sacred outside as inside the cars? Entitled to the same care when lawfully crossing a public road? See also *Bird v. Holbrook*, (4 Bing. 628,) *Jordon v. Crump*, (8 M. & W. 782,) which hold that a party doing an act on his own land, which may endanger human life, though not illegal, as the setting of spring guns, may be responsible for injuries thus sustained, even to a voluntary trespasser. But it is enough in this case, without passing upon these questions, to say that the learned judge erred in nonsuiting the plaintiff. The question of negligence of the deceased, under the evidence, was for the jury. And for this cause there must be a new trial, with costs to abide the event.

GOULD, J. (dissenting.) The deceased, a child 12 years of age, was walking near where a rail road crossed the street, and at a place where for over three hundred feet of the sidewalk along which she was going, she had been in full sight of a train backing up as slowly as she was walking. For a few seconds, during this time, a down train passed, on the parallel track, (further from her than the track on which the up train was backing up,) passed very rapidly, and was entirely away from the place of the injury before the injury happened. The deceased, in broad daylight, and with the backing train

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directly before her and in plain sight, stepped on the rail road track directly in front of the car, just as it reached the crossing, and she was run over and killed; a single truck passing over her.

Now in this case carelessness—a carelessness so decided and plain that there can be no mistake in so calling it, and a carelessness which not only *contributed* to, but was the *sole cause* of the injury—was plainly proved by the plaintiff's witnesses. And where that is proved, there cannot be a recovery.

That, in any given case, the facts being proved, whether those facts constitute carelessness, is a question of *law for the court*, is too well settled to admit of debate. And that where the facts were clearly proved, a verdict for the plaintiff would be set aside, as against evidence, is as little debatable.

In a case against the Albany pier company for not keeping (as by statute required) a timber along the edge of the dock several inches above the dock's level, whereby, it was alleged, a team was backed off into the water and lost, it being proved that the teamster *knew* the state of the dock, and yet backed down to the edge with a load so heavy that his team could not control it, this district general term held the plaintiff could not recover; because the teamster was, as matter of law on those facts, careless.

In *Hyatt v. Grant* (in this district) a passenger on board of a steamboat was killed by a vessel which came into collision with the steamboat. It was proved that the steamboat *could* have avoided the collision; and its not doing so, was held *careless*, as *matter of law*, and the plaintiff was nonsuited. On review at general term we held the *principle* of the nonsuit clearly right, and that it was not necessary to submit that question to the jury; though we sent back the case, on the ground that the *deceased* was not careless, or accountable for the carelessness of the steamboat. And we have given other (unreported) decisions to precisely the same purport.

Neither these decisions, nor any authoritative decisions in the state, leave this point open to the introduction of the

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question of *comparative* negligence, as between the two parties; and they concede carelessness on the part of the defendant. But no repetition of all the circumstances of particular reported cases—so long as they do not meet this rule—can produce any thing but confusion as to the decision of the case before us.

Unless the court are prepared to say that the deceased was not proved to have been at all careless, (in a way that contributed to the injury) it is useless to give details to show that he *was not so very careless as he might have been*; or that the rail road company might have been much more careful than it was; or that a locomotive is a *dangerous thing to run against*. It is dangerous and *known* to be so; and persons should take care not to run against it.

As I understand the opinions, they contain rather plausible *excuses* for the negligence of the deceased than any real denial of its proved existence, and they furnish no ground whatever for reversing the decision already given. I am unable to yield my own strong convictions (as to the true rule of the law) to the high regard I have for my brethren and their opinions; and I feel constrained to dissent from them.

. New trial granted.

[ALBANY GENERAL TERM, March 5, 1860. Gould, Hogeboom and Peckham, Justices.]

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ERNST, executrix, &c. *vs.* THE HUDSON RIVER RAIL ROAD
COMPANY

Where, in an action to recover damages of the defendants for causing the death of another by their negligence, the defendants move for a nonsuit, on the ground that the negligence of the deceased contributed to produce the injury, which motion is granted, to justify the granting of the motion — if it does not appear whether it was granted for the reason specified, or upon the ground that the defendants were not guilty of negligence, or upon both grounds — it must be seen that the evidence in favor of the defendants was so clear, on one or the other of these grounds, that a verdict for the plaintiff would have been set aside as unwarranted by the evidence.

Where a rail road company omits to ring a bell, as required by law, on approaching a street-crossing with a train of cars, it amounts to a neglect of duty — or negligence — on the part of the company ; and although such omission will not absolve one who is driving across the track, at the time, from taking proper precautions, yet if in an action against the company for damages occasioned by a collision, the jury should be satisfied, upon reasonable evidence, that the sound of the bell would have attracted the plaintiff's notice, and enabled him to avoid the danger, it *seems* it is a fair question for the jury to determine, whether there was such freedom from negligence, on the part of the defendant, and such want of care, on the part of the plaintiff, as will defeat the action. And their verdict either way will not be disturbed. GOULD, J. dissented.

MOTION, upon exceptions, for a new trial. The action was brought by the plaintiff, as executrix of Henry Ernst, deceased, to recover damages of the defendant for causing the death of her testator, by negligence. The cause was tried at the Rensselaer circuit, in May, 1859, before Justice GOULD and a jury. The following facts appeared in evidence, on the trial: For half a century there has been a public highway leading from Sand Lake to the city of Albany, passing through the village of Bath, and over the Hudson river by what is known as the Bath ferry. The defendant, as was admitted by the pleadings, operates the Troy and Greenbush Rail Road, which is located on the east bank of the Hudson, and crosses this public highway at Bath. The rail road crosses the highway upon the same level. The company has a station house at Bath, located east of the rail road track and just north of the highway leading to the ferry, and ordinarily has a flagman

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stationed at the crossing. When the accident happened, the deceased resided in the eastern part of the county of Rensselaer, some 14 or 15 miles from Bath. His family consisted of a wife (the plaintiff) and six daughters. On the 29th day of December, 1855, the deceased, having a pair of horses attached to a sleigh, was passing upon this highway in the direction of Albany. On arriving at Bath, he stopped at a tavern, about 158 feet east of the rail road track. As the ferry boat was ready to start, and was only waiting for him, the deceased unhitched his team, seated himself on the sleigh bottom, facing the west, and drove at a moderate pace directly towards the boat. Just as he approached the rail road crossing he came in collision with the defendants' train of cars moving south, and received an injury that caused his death.

The deceased was a teamster, and had for more than 25 years used the road to Albany, crossing at the Bath ferry, and he crossed there very frequently. On the morning of the accident, he went to Bath by the Sand Lake road, from which the cars were visible, if looked for, as far as the nail factory, some miles distant, and might be seen nearly all the way from there to the Bath crossing. He stopped at Dearstyne's tavern till the ferry boat was ready to start; he then came out hurriedly, and drove towards the ferry boat at a moderate pace—either a walk or a slow trot. He had a two-horse team and an empty sleigh. It was cold weather, and he had a shawl about his face. He had no bells on his horses. In going from the tavern to the boat the road is nearly level, or a little ascending, for nearly 158 feet, when it is crossed by the rail road track. For the whole of this distance, except in passing the station-house, a building 12 or 13 feet wide, there is no obstacle to seeing a train approaching from the north. The approach of a train can be heard, without bell or whistle, from one to two miles. The noise of that train had been heard by one Ostrander, some time before the deceased left the tavern. When the deceased was at the middle of Mineral street, 125 feet from the track, Ostrander, whom he had nearly run into, heard the noise

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of the coming cars, looked around, and saw them coming. The cars were moving at the rate of from 30 to 40 miles an hour. Although in a situation to hear, no witness who was examined heard the bell or whistle before the collision. This omission on the part of the engineer in charge of the train attracted the attention of the ferryman, at the time of the collision. Miller, the regular flagman, was absent, and no flagman or other person was present, to warn travelers of the approach of the train. The flagman is ordinarily there for the purpose of signalling the train when to stop for passengers.

Shortly before the collision, and as the deceased approached the track, some person on the ferry boat made signals, and motioned for the deceased to come on. At the same time there was other hallooing in the street, near the crossing. Other motions were made, one man motioned with his hand, waving it towards the east. The bystanders understood the meaning of these signals differently. One thought it meant to keep off; another thought it meant to come on the boat; while others did not understand the meaning at all. The approach of the train was perceived by several persons near the crossing; some saw it; some heard it. The witnesses did not observe whether the deceased looked up or down the rail road track, as he approached the crossing, and it did not appear that he looked in either direction.

The appointment of the plaintiff as the executrix of her deceased husband was duly proved.

The judge declined to submit any question of fact to the jury, and directed a nonsuit. He ordered the plaintiff's exceptions to be heard in the first instance at a general term.

R. Parmenter. for the plaintiff.

T. M. North, for the defendants.

HOGESBOM, J. In this case the judge nonsuited the plaintiff. The nonsuit was moved for on the ground that the negligence of the deceased contributed to produce the injury

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complained of. It does not appear whether it was granted upon that ground, or upon the ground that the defendants were not guilty of negligence, or both. As the judge refused to submit the case to the jury, it must appear that the evidence in favor of the defendants was so clear—on one or the other of these grounds—that a verdict for the plaintiff would have been set aside as unwarranted by the evidence.

If the evidence established the fact that the bell of the engine was rung, at the distance required by law, before reaching the crossing, I should incline to sustain the nonsuit. The deceased could scarcely have failed to discover the approach of the train, had he looked up the track, as he had sufficient time and opportunity to do. There was nothing to obstruct his vision until he got very near the track. There was nothing done by the defendants to mislead or confuse him, unless it was the omission to ring the bell. He sat in the bottom of his sleigh. He was bundled up with a shawl, or something else, about his face, which very probably affected his hearing. He was not observed to look up or down the track, although he might have done so. He was probably intent upon reaching the ferry-boat, which was about to start. The crossing was a much frequented one, with which he was familiar. He drove towards the ferry boat apparently unobservant of, or inattentive to, the approach of the train, which was both seen and heard by several other persons. These facts go very far towards establishing, *prima facie*, a want of care on his part, which should defeat the action.

And yet there are one or two circumstances in his favor, entitled to consideration on the question of negligence. One I have already casually mentioned, to wit: the defendants' omission to ring the bell, except at the moment of collision. I think we must assume, upon the present evidence, that such was the fact. Persons who were in a situation to hear, and would probably have heard the bell, if rung, testify to the fact that they did not hear it. This is, it is true, only negative evidence, and of little weight in comparison with positive

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evidence to the contrary ; but there is no such positive evidence ; and I regard it as strong enough to overcome the legal presumption against a violation of duty. This being so, it established a neglect of duty—negligence, on the part of the defendants. And it may help to excuse the decedent from the imputation of negligence ; for where a bell is required to be rung, the object of it is to notify and warn travelers of approaching danger. The traveler has, I think, a right to rely to some extent at least, upon its being rung. The omission to ring it does not, of course, absolve him from the necessity of other proper precautions. But if the jury should be satisfied, upon reasonable evidence, that the sound of the bell would have attracted the notice of the decedent, and enabled and caused him to avoid the danger, I am not prepared to say that there was such freedom from negligence, on the part of the defendants, and such want of care on the part of the decedent, as defeats the action. And under the evidence, I think this was a fair question for the jury, and that their verdict either way would not be disturbed.

There is another circumstance which appears to me not without some force in exculpating the decedent, if the jury took a particular view of the case. It is the signals or motions made to Ernst, when he was driving towards the ferry boat. They were intended, doubtless, as warnings not to attempt to cross the rail road ; but it is possible he may have understood them as invitations to hasten to the ferry boat, which was about to start across the river. And though it is scarcely probable that he put that construction upon them, I cannot say that a verdict establishing that fact would be without evidence to support it. If he did so understand the signals made to him, then they were calculated to induce him to do just what he did do, and might naturally disarm a prudent person of the suspicion of danger approaching from another quarter.

These considerations have induced me to favor a new trial. I give my entire assent to the proposition that nonsuits in this class of cases, involving the question of negligence, are as

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proper as in any other, and I am quite aware that the sympathies of a jury are naturally inclined to those who suffer from these terrible accidents to such an extent as makes them sometimes forget the rules of law applicable to such questions. At the same time, the law has constituted them the chosen triers of disputed questions of fact, and such questions arise not only where there is a conflict of evidence as to what actually occurred, but where there is a real and well-founded doubt as to the legitimate inferences to be drawn in respect to the existence of certain facts, from certain other facts clearly established by positive evidence. We must assume that in these, as in other cases, jurors will not be guilty of a violation of duty, when they receive proper instructions from the court.

On the whole, though with some hesitation, I think the nonsuit should be set aside, and a new trial granted, with costs to abide the event.

PECKHAM, J. concurred.

GOULD, J. dissented, for the reasons assigned by him in his dissenting opinion in *McGrath v. The Hudson River Rail Road Company*, ante p. 156. In addition to which, the following reasons were given, for his judgment in the present action. "In this case, a man, muffled around his neck and ears, seated in the bottom of his sleigh, knowing all about the rail road crossing at that place, without paying any attention to the fact whether or not a train was coming, drove his horses towards the track, so that the locomotive and the horses came together, without the horses having been at all on the track (for an engineer to see,) and the team was whirled around sidewise; the man was thrown out, and so injured that he died. About one third of a mile of the rail road was in plain sight (if he chose to look) for the whole distance after he left the tavern shed, except some fifteen feet of the way. If he did not see the road, and the coming train, it was because he did not look; if he *did* see it, he took the risk of driving on

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the track in front of it. In either event, he was, beyond all doubt, careless, and contributed by his carelessness to the injury."

New trial granted.

[ALBANY GENERAL TERM, March 5, 1860. *Gould, Hogeboom and Peckham, Justices.*]

BERNHARDT, adm'r &c. vs. THE RENSSELAER AND SARATOGA RAIL ROAD COMPANY.

What circumstances will justify, or require, the submission to the jury, in an action to recover damages for causing the death of another by wrongful act or negligence, of the questions of negligence on the part of the deceased, and negligence on the part of the defendant.

Negligence, whether of the plaintiff, or the defendant, is, in all instances, a question of fact, and it is only where a question of fact is entirely free from doubt that the court has the right to apply the law without the action of the jury. GOULD, J. dissented.

And more especially should that question be submitted to the jury, where some of the matters relied upon to make out negligence depend upon contradictory testimony.

APPEAL, by the plaintiff, from an order made at a special term, granting a new trial. The action was brought by the plaintiff, as administratrix of Gustavus Bernhardt, deceased, to recover damages for the alleged wrongful killing of the deceased, by the defendant, in November, 1846, by running a locomotive engine against him, in the city of Schenectady, and thereby producing injuries of which he died. The defendant, by its answer, denied all negligence or improper conduct on its part, and claimed that the injuries were occasioned by the negligence of the deceased. The cause was tried at the Rensselaer circuit, in February, 1859, before Justice HOGEBOOM and a jury. At the close of the plaintiff's evidence, the defendant's counsel moved for a nonsuit, upon these grounds: 1. That no negligence on the part of the defendant had been shown. 2. That the evidence showed that the inju-

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ries complained of were occasioned by the carelessness and negligence of the deceased. 3. That the evidence showed that the carelessness and negligence of the deceased contributed in a material degree to the injuries complained of. 4. That it did not appear that the deceased was without fault, in producing the injuries complained of. The court overruled the motion, and the defendant's counsel excepted. The jury found a verdict for the plaintiff, for \$4000 damages. The defendant subsequently, upon a case, moved for, and obtained a new trial. (*See 18 How. Pr. Rep. 427.*)

L. Tremain, for the appellant.

W. A. Beach, for the respondent.

INGRAHAM, J. The plaintiff recovered a verdict against the defendants for damages for negligently causing the death of Gustavus Bernhardt. At the trial of the cause the judge submitted to the jury the questions of negligence both in regard to the conduct of the deceased, and of the defendants' agents, and the jury found, on both grounds, against the defendants. A case was afterwards made, and the defendants moved for, and obtained a new trial, at a special term. The grounds upon which the new trial was granted were, that the case showed the deceased to have been guilty of negligence, and that the defendants' agents were not guilty of negligence, in causing the death, and therefore the plaintiff was not entitled to recover.

It must be conceded that under the decisions of our courts, where it clearly appears that the death was caused by the negligent act of the deceased, or that his negligence contributed to it; and also unless it is shown that the defendants' agents were guilty of negligence, the plaintiff cannot recover.

It is not strictly necessary in this case to say whether any negligence, even of the slightest character, on the part of the deceased, could overbalance the grossest negligence on the part of the defendants.

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The rule in England, as originally laid down by Lord Ellenborough, in 11 *East*, 60, was, that "fault in the defendant, and no want of ordinary care to avoid injury on the part of the person injured, was sufficient to give the plaintiff a cause of action." And the same rule was first adopted in this state, viz: "negligence on the part of the defendants, and ordinary care on the part of the person injured, are necessary to sustain the action." Of late, however, a disposition seems to exist to extend this rule much further than to require ordinary care from the injured party, and to relieve from the exercise of any particular caution rail road companies and their agents, although using carriages and power of motion much more likely to cause serious injury and death than were formerly in use, when the rule was originally established. Instead of making the rule in favor of such corporations, and exposing the citizen to greater risk, while more than ordinary care is required of him, it appears to me that the contrary rule should be adopted, where the party has used reasonable care to avoid the accident.

Rail road companies, while in the use of machines eminently destructive of life and limb, should at all times be required to use the utmost care to avoid injuring human beings. The rule in admiralty, since the application of steam to navigation, has been so altered as to throw upon the steam vessel the burden of avoiding vessels using only their sails; and greater care and caution is required of steam vessels, as well because they are more easily controlled as because they are more dangerous and destructive if collisions with them take place; and yet the rule seems to be tending, in the case of human life, to require more care on the part of the man, and less care on the part of those managing steam engines. To the establishment of such a rule I do not yield my assent.

The question, however, in the present case, is whether there were any facts which justified the submission to the jury of the questions of negligence on the part of the deceased and of the defendants. As to the deceased, the evidence showed

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him to have been a stranger. He had just been landed by the cars in a place where rails were running in various directions, on both sides of the platform, and the crossing of some of which must of course have been necessary. The place was crowded with people, the wind blowing a hurricane, his hat blown off, and, in the confusion, he endeavoring to catch it, struck against the engine. Whether or not, under these circumstances, he was guilty of negligence, would depend upon what notice he had of the approach of the engine. A witness, who was near him at the time, testifies that he did not hear the bell ring; and if a person standing there could not hear it, it is not unreasonable to suppose the deceased did not. No man, unless for the purpose of self-destruction, will voluntarily place himself where his life may be taken away; and in this case it seems to me the facts proven, with the doubt as to the deceased being within hearing of the bell of the engine, if it was rung, would make it proper and necessary to submit the question of the intestate's negligence to the jury.

The cases cited by the respondents, as authority for their view of the defendants' liability do not warrant the application of a rule so comprehensive as is contended for by the counsel. In *Harring v. The New York and Erie Rail Road Company*, (13 Barb. 9,) it appears that the plaintiff drove at a fast rate over the rail road track, where he could not see the approach of the cars, and knew that hourly trains were passing that spot. In *Brooks v. The Buffalo and Niagara Falls Rail Road Co.*, (25 Barb. 600,) the plaintiff was held guilty of negligence, because he drove his carriage upon the rail road track when the cars were in sight, coming towards him, and he stopped his horse upon the track and remained there till the engine struck his wagon. And the case of *Dascomb v. The Buffalo and State Line Rail Road Co.* (27 Barb. 221,) is one of a similar character, in which the plaintiff is shown to have driven negligently upon the track while the cars were in sight, coming towards him.

In all these cases, however, the question is stated to be

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whether by ordinary observation and prudence the danger might have been avoided. In the latter case the judge says: "The true test of the defendants' liability is, could the injury have been avoided by ordinary care on the plaintiff's part?" And in *Button v. The Hudson River Rail Road Company*, (18 N. Y. Rep. 248,) Justice Harris admits the rule to be that where the negligence of the defendants is proximate, and that of the plaintiff is remote, the action may be maintained. In *Poler v. The New York Central Rail Road Company*, (16 N. Y. Rep. 476,) the evidence showed that the plaintiff's gate was out of repair, and that he fastened it in a manner which the judge admitted would have warranted the jury in finding the plaintiff guilty of negligence; and yet, although this evidence was uncontradicted, the court of appeals held that the question of negligence was properly submitted to the jury. Judge Selden says: "It will be found impossible to define with precision the relative obligations of the parties in this respect, and it would result, in most cases, in a question (as to negligence) to be addressed to the sound discretion of a jury." So in the present case, although the evidence is such as to have sustained a verdict in favor of the defendants, if the jury had so found, I do not think the negative of the question whether the plaintiff was culpably negligent or not, to be so clear as to warrant the court in deciding thereon as matter of law, and in refusing to submit it to the jury. And more especially should such a question be submitted to the jury, where some of the matters relied on to make out negligence depend upon contradictory testimony.

It will not be denied that negligence is, in all instances, a question of fact; and it is only where a question of fact is entirely free from doubt that the court has a right to apply the law without the action of the jury.

The remarks above made, as to the submission of the question of the deceased's negligence, apply equally to the question of the defendants' negligence. It is a question somewhat contradicted, in the testimony, whether the bell on the engine

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was rung, and whether the defendants were justified in the management of the engine being committed to a person whose capacity was to some extent uncertain. It was also a subject of inquiry whether the person in charge was keeping that strict watch which was required of him in passing through such a crowd; whether his attention was not called to the military company, rather than to the deceased; whether the engine could not have been stopped, had the man in charge kept a proper lookout before doing the injury; and whether, considering the noise and crowd and high wind at the time, the defendants' agents were not required to use more means of giving notice to the persons in danger.

Upon most of these questions there was sufficient evidence to call for the finding of the jury. The evidence does not, in my judgment, present the case in such a manner as to warrant the court in taking it from them. There is no conceded state of facts to justify such a course; but on the contrary, I think it was the duty of the judge to submit these questions to the jury, for their decision.

I am of opinion that the order at special term should be reversed, and judgment should be ordered, upon the verdict, with costs.

HOGEBROOM, J. concurred.

GOULD, J. dissented, for the reasons given by him in *McGrath v. The Hudson River Rail Road Co.*, ante p. 156.

Judgment for the plaintiff.

[ALBANY GENERAL TERM, May 7, 1860. *Gould, Hogeboom and Ingraham*, Justices.]

STEVENS and others *vs.* HYDE and others.

Where a vendor asks to have the contract of sale rescinded, on the ground of fraud, it is sufficient for him to produce and cancel upon the trial, the notes given for the purchase money.

If since the purchase, the purchaser has assigned all his property to trustees in trust for the benefit of creditors, and the assignees are in possession of the property, a tender of the money or property received by the vendor, upon the sale, may properly be made to the assignees, instead of the purchaser.

The rule that where property has been taken *tortiously* or *feloniously* no title passes, and the owner is entitled to reclaim the property wherever it can be found, does not apply to a case where the possession has been acquired by purchase and delivery.

When there is a contract of sale and an actual delivery pursuant to it, a title to the property passes, but the sale is voidable and defeasible, as between vendor and vendee, at the election of the vendor, if obtained by false and fraudulent representations. And the vendor can reclaim his property, as against the vendee, or any person but a bona fide purchaser without notice of the fraud, upon a prompt return of whatever has been paid upon the contract.

An election by the vendor, to rescind, when distinctly and definitely made, cancels and puts an end to the contract, *in toto*, and restores the vendor to his original title as general owner of the property, and leaves the parties in their original position in respect to the title.

If nothing has been received by the vendor, towards the purchase money, notice of his election to rescind the contract, with a demand of the property, will entitle him to reclaim it of any person who may have it in his possession.

If any thing has been paid by the purchaser the vendor must restore it, or offer to restore it, before he can claim to have the contract of sale rescinded; and he must keep his tender good.

MOTION to set aside a nonsuit, and for a new trial, upon a case; which motion was ordered to be heard in the first instance at a general term. The action was for the delivery of personal property, on the ground of fraud in the purchase. The defendants claimed to hold the property as assignees under an assignment made by John S. Joslin, in trust for the benefit of creditors. The complaint alleged a demand of the defendants on the 13th of November, 1857, a refusal by both to deliver possession, and a wrongful detention by both. The defendants answered separately, claiming

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title to the goods under the assignment, and denying the plaintiff's title, &c. and the defendant, Stoddard, also denying the demand and refusal, &c. The property consisted of a stock of hardware worth over \$16,000, purchased of the plaintiffs by Joslin, in February, 1857, at Rochester. The purchase was on credit, and the purchase money was secured by the individual notes of the purchaser, for about \$2300 each, and payable at 3, 6, 9, 12, 15, 18 and 21 months, and the property was delivered to Joslin. The first note was paid at maturity, in cash; the second note was also paid at maturity, partly in cash and the residue in notes, accepted by the plaintiffs. In the latter part of October, 1857, and before the third note matured, Joslin was at Rochester, and notified the plaintiffs in person that he could not meet the paper maturing; and an effort was made to settle the matter, which proving unsuccessful he returned to Utica, and on the 2d day of November, 1857, assigned all his property, including the goods in question, to the defendants, in trust for the benefit of his creditors; the defendants at once taking possession and entering upon the duties of their trust. On or about the 13th of November, 1857, the plaintiffs tendered to the defendant Hyde, one of the assignees, the five purchase money notes not then matured, a portion of the notes received in payment of the second note, and \$3534.41 in money, and demanded the goods. No tender or offer to return the notes or money was made to Joslin, or to Stoddard, nor was any demand made of Stoddard, the other defendant. On the trial at the Monroe circuit, in April, 1859, the plaintiffs brought into court the five unpaid notes for the purchase money, and a portion of the paper received in payment of the second note, to be given up, (the balance of the notes so received in payment having been collected by them after the tender,) but declined to bring in any of the money; the defendants offering to accept the notes and money tendered to Hyde, and to relinquish all claim to the goods, which the plaintiffs refused. It also appeared on the trial, that the plaintiffs,

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after notice of the assignment, waived protest on one of the notes received in payment, and otherwise treated the paper as their own.

At the close of the testimony the defendants moved for a nonsuit, on various grounds. His honor, the circuit judge, without expressing any opinion upon the other points, held and decided that the tender of rescission should have been made to Joslin; "the contract was made with him, and should have been rescinded between the plaintiff and him; the tender of the notes to Hyde left the contract with Joslin still in force." He accordingly granted the nonsuit, and judgment for a return, or the value of the property, &c.

S. Mathews and F. L. Durand, for the plaintiff.

H. R. Selden, for the defendants.

By the Court, E. DARWIN SMITH, J. Upon the ground on which the nonsuit in this action was put, at the circuit, I think it cannot be sustained. Assuming that the plaintiffs had sufficiently established the fraudulent representations alleged in their complaint, to entitle them to recover, to go to the jury upon that question, it was error, I think, to hold that they had not made a sufficient tender before suit brought, to entitle them to rescind the sale and maintain the action. So far as related to the notes of Joslin, received on the purchase, it was sufficient to produce and cancel them on the trial. (22 *Pick.* 18. 1 *Metc.* 558. 3 *Sandf.* 589. 1 *id.* 560.) The rescission of the contract of sale necessarily canceled the notes, if they had not been negotiated by the plaintiff. (*Thurston v. Blanchard*, 22 *Pick.* 20.) But the goods being in the possession of Hyde, at Rochester, who was about to sell them under a general assignment made by Joslin, the tender, we think, might properly be made to him as one of the assignees. Joslin lived at Utica, and by the assignment he had parted with the control, as he had also with the pos-

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session of, and all interest in the goods. The assignees held the goods for the creditors, and if the plaintiffs were bound to restore any thing upon the rescission of the contract of sale, the property to be restored belonged to the creditors, and might rightly be paid to and held by the assignees as a substitute for the goods. A demand of the goods of Joslin in person, at Utica, would have been entirely idle, for he had not the property in possession to enable him to comply with such demand; and a tender to him would have been an equally idle formality, for the plaintiff could not be required to restore to him in fact what they had received towards the purchase, without, at the same time, receiving back the unsold portion of the goods. If a tender to Joslin in person was essential to entitle the plaintiff to rescind the sale and redeliver the goods in the hands of the assignees, or to maintain an action therefor, the rights of vendees in all such cases could be very easily and entirely defeated by the absconding of a fraudulent vendee after an assignment of the property, or by his keeping out of the way till they could sell the property to bona fide purchasers. By the tender to Hyde, the plaintiffs did all that was in their power to do, of any practicable consequence, to make full restitution of all the benefits or considerations received on the purchase, so as to entitle them to rescind the contract of sale.

But it is now claimed by the counsel for the plaintiffs that such tender was unnecessary, and that it was only made for greater caution; that the goods for which this action was brought having been obtained by fraud, the title never passed, and they were entitled to reclaim them wherever they could find them. Such is undoubtedly the rule in respect to property *tortiously or feloniously* taken. In such cases no title can be acquired or imparted. But I think this rule does not apply to cases where the possession of property has been acquired by purchase and delivery. We are cited to quite a number of cases which seem to assert a contrary rule, and there is a great degree of looseness of expression and careless-

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ness of statement in laying down the rules applicable to cases of fraudulent sales. In *Ash v. Putnam*, (1 Hill, 303,) Judge Cowen states the rule as follows: "When a sale is procured by fraud, no title passes to the vendee; the vendor still retains his right in the goods, unless, after discovering the fraud, he assented to and ratified the act of sale positively, or by such delay in reclaiming the goods as would authorize a jury to infer assent;" and cites *Root v. French*, (13 Wend. 570.)

In *Cary v. Hotailing*, (1 Hill, 311,) and *Olmstead v. Hotailing*, (*Id.* 317,) the same doctrine is reasserted. In these cases in Hill, Judge Cowen holds that a sale procured by fraud does not divest the title or possession, so as to deprive the vendor of the right to bring *trespass*. In the case of *Ash v. Putnam*, he held that *trespass* lay against the sheriff who had levied on such property on execution against the fraudulent vendee. In *Cary v. Hotailing*, he held that *replevin* in the *cepit* lay, and also in the case of *Olmstead v. Hotailing*. In *Masson v. Bovet*, (1 Denio, 73,) Judge Beardsley says: "Fraud destroys the contract *ab initio*, and the fraudulent purchaser has no title;" and cites *Chit. on Cont.* 406, 678 and 681, *Am. ed.* This same reference to Chitty I find in many other cases. There is running through the cases, quite generally, such expressions as that used in the text in *Chitty*, 678. "Fraud avoids a contract *ab initio*, both at law and in equity." "Fraud would vitiate and avoid the sale." (3 *John.* 237.) "Fraud vitiates all contracts." "Fraud invalidates every transaction, as well in law as in equity." (1 *Chip.* 63.) "It avoids a contract *ab initio*, even when a credit was stipulated for and given." (9 *Barn. & Cress.* 59.) These expressions are all well enough, and are true, rightly understood. But they are obviously not unqualifiedly true. They embrace as much truth as can be compressed into so few words, but they show the insufficiency of human language to express in short aphorisms all of truth. These expressions are simply relatively true. Fraud does vitiate *ab initio* all contracts, at the instance and election of

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the party defrauded, so far that the contract cannot be set up or urged against him. A contract tainted with fraud as to the party injured, is as no contract, but as against the party committing the fraud and all other persons, it is universally held a valid contract. It may perhaps be said of every contract infected by fraud, as of contracts infected with usury, that it is a *voidable* contract, but not a *void* one. This distinction between *void* and *voidable* contracts is well stated by Chief Justice Spencer, in *Anderson v. Roberts*, (18 John. 515.) He says: "No deed can be pronounced in a legal sense utterly *void* which is valid as to some persons, but may be avoided at the election of others. In *Lilly's Abr.* 807, and in *Bacon's Abr.* title "*Void and Voidable*," we have the true distinction. "A thing is void which is done against law at the very time of doing it, and when no person is bound by the act; but a thing is *voidable* which is done by a person who ought not to have done it, but who nevertheless cannot avoid it himself after it is done." Another test of a *void* act or deed is that every stranger may take advantage of it, but not of a *voidable* one." (2 Leon. 218. *Viner*, title *Void and Voidable*, pl. 4.) It would scarcely be pretended, I think, that a contract of sale infected by fraud was not binding upon the fraudulent party thereto, or could be avoided by a stranger. (See *Chitty on Cont.* p. 680, and cases there cited.) Such contracts in fact are *voidable*, not *void*. The true rule in respect to fraudulent sales is well stated by Chief Justice Shaw, in *Bowley v. Bigelow*, (12 Pick. 312.) Speaking of such a contract he says: "This contract and delivery were sufficient in law to vest the property and make a good title, if not tainted with fraud. But being tainted with fraud between the immediate parties to the sale, was *voidable*, and the vendors might avoid it and reclaim the property. But it depended upon them to avoid it or not, at their election." He says also: "We take the rule to be well settled, that when there is a contract of sale and an actual delivery pursuant to it, a title to the property passes, but

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voidable and *defeasible* as between vendor and vendee, if obtained by false and fraudulent representations. The vendor can reclaim his property as against the vendee or any person but a bona fide purchaser, without notice of the fraud." In 4 *Paige*, 537, Chancellor Walworth states the rule to the same effect, and very much in the same language; and in the case of *Masson v. Bovet*, (1 *Denio*, 74,) Judge Beardsley says: "If the party defrauded in such case would disaffirm the contract, he must do so at the earliest practicable moment after discovering the cheat;" and in *Baker v. Robbins*, (2 *Denio*, 138,) the same learned judge says, speaking of a fraudulent sale: "The contract, although fraudulent, is not, *ipso facto*, void; it was only voidable by a prompt return of whatever had been received upon it." Such also is the language of Judge Brown, in *The Matteawan Co. v. Bentley*, (13 *Barb.* 645.) If the contract of sale in such cases is not absolutely void, but merely voidable at the election of the vendor, the contract must be valid until it is avoided by the vendor, and the title must necessarily pass. The vendee must possess the naked, legal title, but defeasible or revocable at the election of the vendor. In *Anderson v. Roberts*, (18 *John.* 515,) it was held by the court of errors that under a fraudulent deed the title passed to the grantee; and in *Somers v. Brewer*, (2 *Pick.* 184,) where a grantee obtained a deed of land by fraud and imposition upon the grantor, without consideration, it was held that the title passed. The analogy is complete between land and chattels. In one case the title passes by deed, and in the other by delivery, in pursuance of a written or an oral contract. In *Mowrey v. Walsh*, (8 *Cowen*, 238,) and in numerous other cases, it is held, and I think it is universally considered now as settled law, that a bona fide purchaser from a fraudulent vendee who has acquired possession by the consent or voluntary act of the vendor, gets a good title. (18 *John.* 515. 4 *Kent*, 464. 2 *Pick.* 184, and 12 *id.* 307. *Saltus v. Everett*, (20 *Wend.* 275.) In *Ash v. Putnam*, (1 *Hill, supra*,) Judge Cowen questions the pro-

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priety of the decision in *Mowrey v. Walsh*, suggesting that it is an exception to the general rule that a person who has no title can convey none. He says: "*Mowrey v. Walsh* is an *anomaly*, for there is no general principle in the law that the equity of a bona fide purchaser from one destitute of title, shall overrule the prior legal right of the owner." The whole error in the learned judge, consists in assuming that the fraudulent grantee has no title. If he had been content to follow the old supreme court in the case of *McCarty v. Vickery*, (12 John. 348,) he would have found no difficulty. In that case it was held, in the case of a fraudulent sale of chattels, that "by delivery the property was changed, and *trespass* could not be maintained." The simple doctrine of this case makes all clear and simple. A fraudulent vendee of chattels, when there is an absolute and unqualified delivery with intent to transfer the property, like the fraudulent grantee of lands, acquires the title—a *naked, voidable, defeasible* title—which, on a sale by him to an innocent purchaser, passes. I agree that the cases of *Mowrey v. Walsh* and *Saltus v. Everett*, and other cases sustaining the title of the bona fide purchaser from the fraudulent vendee, rests upon no principle, if the fraudulent vendee acquires no title, and his possession is *tortious*. If he has no title it is a solecism in the law to say that he can convey one. It is repugnant to that sound maxim "that no one can convey to another a better title than he has himself." This is the very difficulty with property acquired *tortiously* or *feloniously*. No title can be imparted, in such cases, because the party has none to convey. But with property acquired under a contract of sale when the *delivery* is unconditional, or by a conveyance, the title passes and remains in the vendee, *voidable* at the election of the vendor, until parted with to a bona fide purchaser, subject of course to the qualification that the fraud may be waived, and will be deemed waived, if the right of election to rescind the contract is not promptly exercised, or within such period as to preclude the implication of con-

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sent to the contract, after the discovery of the fraud. The doctrine of the cases of *Ash v. Putnam*, *Cary v. Hotailing*, *Olmstead v. Hotailing*, and *French v. Root*, that the general property remains in the vendor, after the sale, and that he may, without any demand or act of rescission, maintain trespass as for a tortious taking, where a sale has been made upon credit, and the property absolutely delivered, cannot, I think, be sustained. The rule of these cases doubtless does apply to cases of sales where the delivery is conditional. Where a sale is for cash, and no credit is given or intended, and possession is obtained by fraud, and without consent, or against the will of the vendor, the taking would doubtless be tortious. Such are the cases cited by Judge Savage, in *French v. Root*, (*supra*,) viz: *Allison v. Matthieu*, (3 John. 238;) *Van Cleaf v. Fleet*, (15 id. 150,) and 1 *Barn. & Cress*. 514. Which last case is also cited in *Ash v. Putnam*, with *Kilby v. Wilson*, (*Ryan & Moody*, 178.) These, with the case of *French v. Root*, are the cases chiefly relied upon by Judge Cowen. These were all instances of sales for cash, where no credit was given or intended, and where possession was wrongfully obtained. The case of *Buffington v. Gerrish*, (15 Mass. Rep. 156,) also cited in *French v. Root*, was a case of the reclamation of property against the vendee; and the only other case cited is *Mowrey v. Walsh*, where the opposite principle is really carried out and asserted. These cases obviously furnish no authority for the doctrine asserted in *Ash v. Putnam*, and the two following cases in 1 *Hill*. There was not, in these cases, any contract to rescind. No contract had been consummated, no delivery had been made with intent to pass the property and complete the sale; and without delivery no title passes upon a sale of chattels. (*Brower v. Peabody*, 3 Kern. 124.) The case of *Hunter v. The Hudson River Iron and Machine Co.* (20 Barb. 493,) contains expressions following the cases of *Ash v. Putnam*, *Cary v. Hotailing*, *Olmstead v. Hotailing*, and *French v. Root*. But that was a case between the original parties, calling for no

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decision on this question, and the reference to these cases is without discussion. The learned judge also cites 13 Barb. 641, in which Judge Brown, although he refers to these cases for the general doctrine on the subject of fraudulent sales, obviously did so distrustfully of their soundness, for he says: "The expression, sometimes used in the books, that when a sale is procured by fraud and misrepresentation no title to the vendee passes, must be taken with this qualification: The sale is not absolutely *void*, but only *voidable*, at the option of the vendor." In the general views of this case I entirely concur, and think it contains a sound and correct view of the law on the subject, with the single qualification that I think it a mistake to say that the general title to the property before rescission or avoidance of the contract, remains in the vendor. The case called for no decision of the question, and none was, I think, intended. The learned judge says also, in another part of the opinion: "The contract, although fraudulent, was not *ipso facto* void; it was only voidable by a prompt return of what was received under it. It was not void, if it was only *voidable* at the option of the party *defrauded*." Until such avoidance, how can it be said that the title to property absolutely delivered in pursuance of it, does not pass? If the title does not pass at the time of the sale upon delivery, when does it pass? Does it remain forever in the vendor, or *in nubibus*? What definite act is essential to pass it afterwards? Will mere delay to rescind affirmatively pass the title, *per se*? At what precise moment thereafter is the title of the vendor divested? When can it be said, with certainty, that the one has *parted with*, and the other *acquired*, the title? It is far better to hold, I think, the general naked title passes by *delivery*, subject to the right of rescission and revocation, until the property is changed or transferred to an innocent holder. This is a simple rule and easy of application. If these views are correct, the plaintiff in this case had the election to rescind the contract of

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sale and reclaim the property when they assumed the right to do so. (4 *Paige*, 537.)

This election, when distinctly and definitely made, cancels the contract *in toto*, (if the plaintiff was right in his assumption of the fraud) and restores the plaintiff to his original title as general owner of the property. It puts an entire and absolute end to the contract, to the same effect as if no contract had been made, and leaves the parties in their original position in respect to the title. If nothing had been received by the plaintiff in this action towards the purchase of the goods in question, the case would be free from difficulty. In such case notice of the election to rescind the contract and sale, with a demand of the property, would have entitled them to reclaim it of any person who might have it in possession; but he cannot reclaim it without such notice and demand. In *Tallman v. Turck*, (26 *Barb.* 167,) it was held that replevin lay against an assignee, without a demand. The case is not fully reported, and it may in its facts have presented a case of a *tortious taking*; if so, it was rightly decided. But it is a fundamental mistake, in my opinion, to hold that there is a *tortious taking* in these cases of fraud where the property is absolutely delivered, freely and intentionally, in pursuance of an express contract of sale; and much more so that an assignee or innocent bailee, or other person receiving such property by *delivery*, without personal complicity with the fraud, can be liable to an action for such property as for a conversion thereof, without a demand. I think the rule is clearly otherwise, and that it may be stated as a proposition universally true, that no man can be subjected to an action in respect to personal property in his possession, received by delivery, without personal wrong on his part, until he has refused to deliver it, upon a lawful demand, to the true owner. (*Morris v. Reedford*, 18 *N. Y. Rep.* 552. *Ely v. Ehle*, 3 *Hill*, 348 and 350. 3 *Comst.* 506. *Fuller v. Lewis*, 13 *How.* 219.) But in this case a rescission of the contract could not be made upon such

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easy terms. A party desirous of rescinding a contract, as Judge Cowen says, in *Voorhees v. Earl*, (2 Hill, 293,) "must do so *in toto*, and cannot hold on to any part." While the plaintiffs in this case practically have admitted this to be the rule, by the tender they made before the commencement of the suit; at the trial they virtually repudiated it and deny its correctness now, so far as to claim to hold on to the \$3534.41 cash received by them on the purchase to indemnify them for the goods sold by Joslin. It appears that the defendants not only did not keep the tender good, but that they refused to produce the money, at the trial, upon demand of the defendants then and there made, and upon their offer to relinquish all claim to the goods replevied. This was the precise case in *Wheaton v. Baker*, (14 Barb. 594,) where 166 stoves were sold and part of the price paid in the notes of third persons. The vendee sold 66 of the stoves before the vendor elected to rescind, when he did not tender the notes received nor produce them on the trial, but claimed the right to retain them to indemnify himself for the stoves sold. The court held that this was inadmissible, and that the contract was not rescinded. In *Voorhees v. Earl*, (2 Hill, 288,) the plaintiff purchased 220 barrels of flour; 55 proved bad, and they offered to return them, and demanded back the purchase money. The court held that they must rescind *in toto*, and could not affirm the contract in part and rescind in part. So in *The Matteawan Co. v. Bentley*, (13 Barb. 641,) machinery was sold for \$1283.37, part of the price paid, and the vendor claimed to rescind and recover the balance without offering to return the money received. This, it was held, could not be done. A different rule, and one in conflict with this case, was held in *Ladd v. Moore*, (3 Sandf. 589,) where a plaintiff who sold goods for \$480, and received \$200 cash in hand, was allowed to recover in trover of the fraudulent vendee for the balance of the purchase money as upon a rescission of the contract. This case did equity between the parties, but it rests upon no principle. The contract clearly

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was not rescinded, and could not be while the plaintiff kept the \$200 in hand. It was virtually affirmed, so far as relates to this \$200, and rescinded for the balance. Some excuse was made for not tendering the \$200 before the commencement of the suit, but I see none for not producing it at the trial.

If we are right in the view that a tender to Joslin, or to his assignee, was necessary in this case, to effectuate a rescission of the contract, I cannot see upon what principle it can be maintained that the plaintiff need not keep the tender good, and was not obliged to produce the notes and money received, on the trial. I think they might have brought them into court before trial, as was done in *Stewart v. Austin*, (1 Metc. 557,) but when they refused to produce them at the trial, I do not see how the action could be further maintained. In these cases of the rescission of contracts by the acts of the parties, the party seeking to rescind acts upon his strict legal rights, and there is, as we have seen, no rule which allows him to keep back any part of the consideration received. It may be that Joslin, in this case, had sold more of these goods in value than the amount of the money received by the plaintiff, but on the rescission of the contract the title of the goods unsold became and was reinvested in the plaintiff and the title to the money in the defendants or Joslin; and I know of no way of adjusting the equities between the parties, on the trial of an action at law, or of making equitable terms at the circuit, on the trial of an action of replevin for the goods. If the action had been one in *equity*, the plaintiff seeking a rescission through the action of the court and offering to do equity, the court would be called upon to take into consideration the situation of the property, the amount thereof sold by Joslin, and the amount of consideration received by the plaintiff, and could have done complete justice to the parties upon the whole case and in view of all its circumstances. But I can see no way to adjust such equities at *law*, or to do complete justice to parties in a case like this, when part of the goods

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are sold and part paid for. When, therefore, the plaintiffs refused, on the trial, to make full restitution of all they had received towards the purchase of the goods, I can see no other course that could have been taken at the circuit, except for the court to order a nonsuit. The nonsuit was moved upon this ground among others, and although it was not put upon this express ground, it must nevertheless be sustained, as the point was distinctly made. If a nonsuit is right upon any of the grounds urged at the trial, or otherwise, it cannot be set aside.

A new trial should therefore be denied.

[MONROE GENERAL TERM, March 5, 1860. *Wells, Smith and Johnson*, Justices.]

RICHARD P. BARKER, adm'r, &c. and ELIJAH T. BARKER,
vs. JULIA A. CROSBY and others.

A testator, by the eighth section of his will, directed his executors to collect and pay over to his son Peter, for his maintenance, the net income of two houses and lots in the city of New York, No. 17 Elm street, and the house at the corner of Mulberry street, during his natural life; and to invest, on mortgage on real estate, \$8125, and pay the income to Peter in the same manner. At the death of Peter, leaving lawful issue, the testator gave the money and real estate to them; and for want of such issue he bequeathed the said share to the surviving sons and daughters of the testator, share and share alike. The testator then stated it to be his will that in the event of the death of Peter, without issue, his share should *come back to the lawful issue* of the testator, and be distributed as above directed, and not be subject to the claims of Peter's creditors. The twelfth section of the will directed that such property as was directed by the will to *come back to the estate*, should be divided equally among the sons and daughters of the testator; that all sums that Peter and Elijah might become entitled to receive under the will should be invested by the executors on bond and mortgage, and the interest be paid to them; and that at their death the amount should be paid to their issue; but, failing issue, that the same should be paid to the surviving children of the testator, share and share alike. The 14th section, whereby the testator disposed of the residue of his estate equally among all his children, contained the same provision as to *all sums*

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of money to which Peter and Elijah might become entitled, in any way, under the will. By the 13th section, the testator directed his executors to sell and convey in fee all his real estate, not thereinbefore devised, as well as such *real estate as might come back to his estate*, and to sell all personal property not thereinbefore devised, and to apply the avails thereof, with his money at interest and on hand, for the payment of the legacies before named. Peter died in 1846, without issue, leaving six brothers and sisters surviving him; one sister, S., having died before him. The executors sold the real estate and converted it into cash. It did not appear whether there were any unpaid legacies under the will, at the time the real estate was sold.

Held, 1. That there was no authority in the executors, under the will, to sell the real estate named in the eighth section; and that there was not, therefore, a conversion of that real estate, by the testator, into personal estate.

2. That on the death of Peter, Elijah took a vested interest in one-sixth part of the real estate mentioned in the eighth section in fee; and that if the same had been sold by the executors, and Elijah had affirmed or should choose now to affirm the sale thereof, he was entitled to one-sixth part of the proceeds, in possession.
3. That Elijah was also entitled to one-sixth of the share of his brother Peter in the proceeds of the real estate set apart by the sixth section of the will for Sarah, who had since died without issue; the real estate set apart for her falling into the residue of the testator's estate, and Peter as well as Elijah and the other children of the testator deriving title to their respective shares by virtue of the 14th section of the will, and not as heirs of Sarah.
4. That the interest of Elijah in the share of Peter, in the real estate set apart by the will for the use of Sarah, vested in Elijah absolutely, on the death of Peter, freed from any restraint on the power of alienation; and that the one-seventh of the real estate set apart for Sarah, or the proceeds thereof, which passed to Elijah under the will, in his own right, still remained in the hands of the executors, legally subject to the restraint upon its alienation as provided by the will.
6. And that the same rule applied to the share of Elijah in the real estate purchased by the executors under the directions of the will for the use of J. B. jun.
7. That the sum of \$8125, embraced in the share of Peter, under the will, was controlled by the 12th and 14th sections, in respect to the right of Elijah to receive the possession of his share thereof on the death of Peter without issue.

ACTION for the construction of a will, and the determination of the rights of the parties under the same.

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Thos. H. Rodman, for the plaintiffs.

M. S. Bidwell, for the defendants.

LEONARD, J. The complaint asks for the determination of the rights of the plaintiff Elijah T. Barker, under certain provisions of the will of his late father James Barker.

The testator died in 1843, leaving eight children surviving him, for each of whom he made a distinct and separate provision, as well as for his widow who still survives.

The principal question argued at the hearing, and insisted on by the plaintiffs, refers to the devise in favor of Peter G. Barker, provided for in the eighth section of the will. This section directs the executors to collect and pay over to Peter for his maintenance the net income of two houses and lots in the city of New York, No. 17 Elm street, and the house at the corner of Mulberry street, during his natural life, and to invest on mortgage on real estate \$3125, and pay the income to Peter in the same manner. At the death of Peter, leaving lawful issue, the testator gives the money and real estate to them; and for want of such issue, he bequeaths the said share to the surviving sons and daughters of the testator, share and share alike. The testator then explains that it is his will, that in the event of the death of Peter, without issue, the share of Peter shall *come back to the lawful issue* of the testator, and be distributed as above directed, and not be subject to the claims of Peter's creditors.

Peter died in 1846, without issue, leaving six brothers and sisters surviving him, one sister, Sarah, having died before him. It is insisted by the defense that the interest of the plaintiff, Elijah T. Barker, in the share of his deceased brother, is controlled, in respect to the possession thereof, by the subsequent sections of the will to which I shall now refer.

The twelfth section directs that such property as is directed by the will to *come back to the estate*, shall be divided equally among the sons and daughters of the testator; *all*

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sums that Peter and Elijah may become entitled to receive under the will, shall be invested by the executors on bond and mortgage, and the interest shall be paid to them, and at their death the amount shall be paid to their issue, but failing issue, the same shall be paid to the surviving children of the testator, share and share alike. The fourteenth section, whereby the testator disposes of the residue of his estate equally among all his children, contains the same provision as to *all sums of money* to which Peter and Elijah may become entitled in any way under his will. There can be no doubt that the sum of \$3125, embraced in the share of Peter, under the will of his father, is controlled by the twelfth and fourteenth sections, in respect to the right of Elijah to receive the possession of his share thereof on the death of his brother Peter without issue, but how is it in regard to the real estate belonging to Peter's share situate in Elm and Mulberry streets?

The proof shows that the executors have sold the real estate and converted it into cash. What was their authority for so doing, and was it the design of the testator that this real should become personal estate, in the contingency of the death of Peter without issue? If the authority to sell, and the intent so to convert this real estate, exists, or is made manifest at all, it must be found in the thirteenth section of the will. By that section the testator directs his executors to sell and convey in fee all his real estate, not thereinbefore devised, as well as such *real estate as may come back to his estate*, and to sell all personal property not thereinbefore devised, and to apply the avails thereof, with his money at interest and on hand, for the payment of the legacies before named.

There is no direct proof whether there were any unpaid legacies under the will at the time this real estate was sold. It is fair, I think, to infer that the testator did not look to the undevised remainders in his real estate, from which he had carved life estates for some of his children, to make good his testamentary bounty. He mentions his money at interest,

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and on hand, and this fact, with the impossibility of forming any accurate judgment as to whether any thing could be depended on by his executors for the payment of legacies, to be derived from such remainders, induces me to believe that the testator refers to some other real estate which his executors are to sell, when he mentions "real estate not hereinbefore devised."

If there were no legacies unpaid, then clearly no authority existed to sell any real estate of the testator, because there would exist no subject for the application of the proceeds under the will.

The ninth and tenth sections contain express provision for the real estate therein mentioned, on the contingency referred to, viz: "*coming back to his estate.*" These are the same words used in the twelfth and thirteenth sections, but those words are not found in the eighth section. There his executors are authorized to sell only real estate not before devised, and such as *may come back to his estate*, and the only direction as to the application of the proceeds, is to pay legacies.

The eighth section fully disposes of the whole title to the real estate therein mentioned. The remainder, after Peter's life estate, does not "come back to the estate of the testator," but "comes back to the *issue* of the testator," and is to be distributed as "above directed." A distinct direction is in the eighth section previously given as to the disposition of the remainder pertaining to Peter's share in the real estate on his death without issue; the direction is, that it shall go to his surviving sons and daughters or their issue, share and share alike.

The construction claimed by the defense is too inconsistent with the express language of the eighth section to prevail.

I think there was no authority in the executors, under the will, to sell the real estate named in the eighth section, and that there was not, therefore, a conversion of this real estate by the testator, into personal estate. On the death of Peter, the plaintiff Elijah took a vested interest in one sixth part

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of the real estate mentioned in the eighth section, in fee, and if the same has been sold by the executors, and Elijah has affirmed, or chooses now to affirm the sale thereof, he is entitled to one-sixth of the proceeds in possession.

Elijah is also entitled to one-sixth of the share of his brother Peter in the proceeds of the real estate set apart by the sixth section of the will for Sarah Barker, who died without issue in 1844. A life estate was devised to her, with remainder to her issue. She died, however, without issue, and the real estate set apart for her fell into the residue of the testator's estate, and Peter, as well as Elijah and the other sons and daughters of the testator, derived title to their respective shares by virtue of the fourteenth section of the will, and not as heirs of Sarah.

Conceding that the power of sale mentioned in the thirteenth section applied to this share of the real estate on the death of Sarah, and that it has been sold, and the share of Peter therein invested in the manner directed by the fourteenth section of the will, then so much of the estate of the testator has been under restraint, as to the power of alienation for two lives. That interest in the share of Sarah cannot therefore be longer subject to such restraint. By the direction of the will, all money coming to Elijah thereunder is to be invested for his use, and the final vesting of the title of the share of Elijah in the share of Peter in the share of Sarah, would thereby be further restrained during the life of Elijah. Such continued restraint is not permitted by law, and the interest of Elijah in the share of Peter in the real estate set apart by the will for the use of Sarah vested in the said Elijah absolutely on the death of Peter, freed from any restraint on the power of alienation. The one-seventh of the real estate set apart for Sarah, or the proceeds thereof, which passed to the said Elijah under the will, in his own right, still remains in the hands of the executors, legally subject to the restraint upon its alienation as provided by the said will.

The same rule last mentioned applies to the share of Eli-

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shall invest her share of the estate, at interest, in the manner directed by the will. She alleges that the executors have collected all of the estate at present collectable, and neglect to put it at interest, as required by the will, but are using it in their joint commercial enterprises; that they have small means, and the estate is in jeopardy; that all the debts of the deceased have been paid, and the executors have a large sum of money in hand belonging to the estate.

These defendants demur, on the ground that the court has no jurisdiction over foreign executors, or that the facts stated in the complaint do not make such a case as will entitle the plaintiff to invoke the aid of a court of equity against foreign executors.

The executors are not sued for any liability of the deceased, or his estate, but on their own liability for the wrongful use or misapplication of the trust funds which have come to their hands. The plaintiff requires them to perform their own duty or obligation, not any liability which existed against the deceased or his estate.

Courts of equity have sometimes granted their aid in behalf of the creditors of deceased persons against foreign executors. In such cases there has been a liability or debt on the part of the deceased, and an improper neglect of trust duties by the foreign executor, or an abuse of trust funds.

The will of the deceased, and the liability of the executors, are to be judged only according to the law of Nicaragua. But what reason is there to suppose that the law of Nicaragua would not require these executors to invest the trust moneys, after the payment of the debts of the deceased, according to the directions of the will? The presumption is certainly in favor of such a claim. The defendants are alleged to be now residing in New York. Possibly they will not again go within the jurisdiction of Nicaragua. Will they thus claim a perpetual exemption from the performance of their duty?

The defendants urge that no proceedings have been taken

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before the surrogate here. None are necessary. The estate of the deceased has been collected. There is no intervention of executors for that purpose required. There are no debts owing from the estate, and none owing to the estate here. No letters of administration here are necessary to call these executors to account; for the funds in their hands are not unadministered assets. The claim here is for a breach of duty which the defendants have committed, whereby the plaintiff is aggrieved.

The defendants have the right to claim the benefit of the laws of Nicaragua, but there is no reason to suppose that that state does not compel trustees and executors to fulfill their duties.

The obligation of foreign executors to the devisees or legatees under the will of a deceased person domiciled abroad, after the debts of the deceased party have been satisfied, offers no better reason for immunity from the process and judgments of courts of equity in other countries, for their wrongful dealings with the trust funds, than the case of trustees appointed by deed in a foreign country for the abuse of their trust. There is no exclusive locality, for the demand of justice under such circumstances.

The demurrer is overruled, with leave to the defendants Clover and Matthew J. Glenton to answer in twenty days, on payment of the costs of the demurrer.

[NEW YORK SPECIAL TERM, April 3, 1860. *Leonard*, Justice.]

McWILLIAMS vs. LONG and POILLON.

A vendor, who wishes to rescind the contract of sale or to hold the purchaser to a performance on the day appointed, should have his deed prepared and executed, ready to be delivered on the payment of the purchase money.

When the time for the payment of the purchase money is not an essential ingredient in, or inducement to, the execution of a contract of sale and purchase, the payment or tender may be made within a reasonable time after the day named.

A purchaser, seeking the aid of a court of equity to enforce a specific performance, must apply promptly. If he slumbers upon his rights for five years after becoming entitled to a conveyance, a specific performance will not be decreed, but he will be left to his remedy, if any he has, by an action for damages.

THIS was an action brought by one of the parties to an agreement, to be relieved therefrom.

Sickles & Cushing, for the plaintiff.

J. C. Leveridge, for the defendants.

LEONARD, J. The plaintiff brings this action to be relieved from an agreement between himself and the defendant Long, for the sale of a lot of land at the corner of Broadway and 67th street, made March 9th, 1851, which the defendant Long assigned to the Messrs. Poillon, and which was recorded April 5th, 1851, and is a cloud, as the plaintiff alleges, upon his title, and prevents him from improving or selling his lot. He alleges that he has always been ready and has offered to perform the agreement on his part, but the defendants neglect and refuse. The defendants, admitting the agreement, assignment and record, deny the other facts on which the plaintiff claims relief. The Messrs. Poillon allege a tender of performance and a continued readiness on their part, and demand a specific performance. The allegations constituting a counter-claim are all put at issue by the plaintiff's reply.

The plaintiff, and the defendants, except Long, who claims no interest in the question, have respectively been examined as witnesses in their own behalf, and they are entirely at variance in respect to tenders and offers of performance which

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the defendants Cornelius and Alexander C. Poillon claim to have been made by them to the plaintiff. It is not disputed, however, that the plaintiff was notified, at his residence, on the premises in question, on behalf of these defendants, to attend at the office of their attorney on the day appointed for the consummation of the agreement, for the purpose of carrying it into effect; and that the plaintiff, with his wife, did attend at the place requested, with a deed of the premises duly prepared and ready for execution, between the hours of two and three o'clock P. M. on that day. That the defendant Alexander C. Poillon met the plaintiff there shortly after three o'clock P. M. and that the plaintiff showed him the deed, to which no objection was made, and declared himself ready to execute it, together with his wife, and to deliver it when he saw the money which was to be paid to him. That the defendant Alexander C. Poillon showed the plaintiff a check on a bank in this city for the amount due, and offered to deliver it in payment; that the plaintiff refused so to receive it, and insisted upon payment in money. That the plaintiff, by agreement with the said Alexander C. Poillon, waited at the house of a friend who resided near the said office, in company with his wife, till about nine o'clock P. M. to receive the money due him, and to execute and deliver the said deed. That the attorney of the said defendants, during the evening, offered, on their behalf, to pay the amount due, partly in gold and partly in his own bank check, but the offer was declined. This offer was made to the plaintiff's wife, but the plaintiff was in an adjoining room, and the offer was probably declined by his authority. No other offer of performance was made by either party, after the plaintiff arrived at the office of the defendants' attorney, on the day when performance was due by the terms of the contract.

The defendant Cornelius Poillon testified, at the trial, in behalf of the defendants, that at about half past eleven o'clock A. M. of the day when the contract was to be performed, he tendered to the plaintiff the sum of \$1450 in gold, at the

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premises in question, and demanded a deed for the land. That the plaintiff refused the money, and said he had made up his mind not to sell his land. That no one except the plaintiff and his wife, and he thinks also two or three small children, were present, besides himself. The defendant Alexander C. Poillon also testified, at the trial, in behalf of the defendants, that he, in company with Mr. Kellum, went to the residence of the plaintiff at the premises in question, on the next day after the interview at the office of the defendants' attorney, with the amount due to the plaintiff, in gold, or gold and silver, and tendered it to the plaintiff and demanded a conveyance of the land. That the plaintiff refused to receive the money or make the deed, because payment had not been made at the time appointed in the contract. Mr. Kellum also testifies in behalf of the defendants that he was present and saw the tender last mentioned, but he did not know the amount tendered. The plaintiff, testifying as a witness in his own behalf, denies the truth of both these statements. He testifies that he never saw the defendant Cornelius Poillon until the time of the trial; that neither Cornelius nor Alexander ever made any tender of payment at his residence, at any time or in any manner.

The plaintiff has not established a case entitling him to any relief. If he desired to rescind this contract, or to hold the defendants to performance on the day appointed, it was his duty to have his deed prepared and executed. His wife might possibly have refused to sign it, as he had agreed she should, and thus put it out of the plaintiff's power to perform his part of the agreement. This prerequisite to declaring the contract forfeited or rescinded, as against the defendants, is wanting. Whether the plaintiff had any right to claim that performance could not be demanded by the defendants after the day appointed by the agreement, it is not necessary to decide; although I am of opinion that the time of the payment was not an essential ingredient in, or inducement to, the execution of the contract, and it might therefore

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be performed within a reasonable time after the day named (*Wells v. Smith*, 7 *Paige*, 22.)

I consider the evidence as to the tender testified to by Cornelius Poillon as balanced by the counter testimony of the plaintiff. It is certainly singular that no reference was made to this transaction, at the subsequent interview at the office of the counsel for the Messrs. Poillon; or that when an interview had been appointed to take place on the same day, at the office of their counsel, they should not have on hand the same gold with which the tender had previously been made.

The evidence of the tender made by Alexander C. Poillon on the next day, was corroborated by that of Mr. Kellum, and this fact is to be assumed as established in favor of the defendants.

The length of time which elapsed before the defendants Cornelius and Alexander C. Poillon made their claim in court for a specific performance of this contract has, however, debarred them from the relief which they claim. Assuming that the tender which was made by Alexander C. Poillon on the third of June, 1851, was in time, and gave the defendants the right to the demand the aid of a court of equity to compel the plaintiff to convey to them the land, it does not follow that they can slumber in that position for five years, to ascertain whether the price of the land appreciated or declined, and then invoke the same relief from a court of equity. This relief, if desired, should have been sought promptly. The defendants must, therefore, take their remedy, if any, by an action for damages.

There was no relief sought by the complaint in any manner affecting the rights of the defendant Long injuriously, and there was no occasion for him to have defended.

The complaint and the counter claim are therefore dismissed without costs to either party as against the other.

STERN and others *vs.* FISHER and HAMBURGER.

HERMAN and others *vs.* THE SAME.

FALKENSTEIN and others *vs.* THE SAME.

A clause, in an assignment of property in trust for the benefit of creditors, which directs the assignee "to sell and dispose of the property and convert it into money, but not upon credit," does not render the assignment void.

Where a creditor whose debt is preferred, in an assignment, holds securities for the payment of his debt, it is proper that the assignment should mention that fact; but an omission to refer to it is not inconsistent with entire honesty and good faith.

THESE suits were brought for the purpose of setting aside an assignment made by the defendant Fisher, for the benefit of creditors.

Benedict & Boardman, for the plaintiffs Stern and others.

Hull and Stocker, for the plaintiffs Herman and others, and Falkenstein and others.

Wm. M. Evarts and B. M. Harrington, for the defendants.

LEONARD, J. The object of these actions is to have an assignment, made by the defendant Fisher to the defendant Hamburger for the benefit of creditors, containing certain preferences alleged to be fraudulent, declared void. It is insisted that the assignment is also void for matter apparent on its face, under recent decisions in this state. The several complaints are on behalf of judgment creditors, having executions returned unsatisfied.

The assignment directs the assignee to "sell and dispose of the property, and convert it into money, but not upon credit." The restraint upon the discretion of the assignee in respect to giving credit, it is insisted, is unlawful, within the meaning of the decisions declaring such instruments to be void, where they authorize the assignee to sell upon a credit.

I am unable, however, to view the provision in question in that light. No decision has as yet come to my knowledge, that interferes with the right of the assignor to direct the trustee

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to convert the assigned estate into cash. The words complained of in this case, "*but not upon credit*," add nothing to the previous direction to sell and convert the estate into money. In effect the estate is to be got into cash without delay. A direction to sell on a credit might operate to hinder or delay creditors, but it is not easy to see how the same argument is to prove that the contrary course would have that result. The words in question are unnecessary; but they do not, as I conceive, render the instrument void.

The preferences complained of are in favor of the defendant Hamburger for \$1775, and of G. Rosenblatt & Brothers for \$900. These demands are alleged to be fictitious. The evidence on the part of the plaintiffs raised some doubt as to the good faith of these demands, but there was not, at any time during the trial, such a case made out against the defendants as rendered these suspicions grave certainties. The evidence, I think, establishes that the defendant Hamburger held the note of Fisher for money loaned, on which there was actually due at the time the assignment was made \$1675 for principal and interest, and that the further sum of \$100 was loaned by Hamburger to Fisher, to relieve his immediate necessities, just before the assignment was executed.

As to the preference in favor of Rosenblatt & Brothers, it is proven that they exchanged their note for \$920 with Fisher, which had not matured when the assignment was made. That Fisher had obtained a discount at bank of his own note, having deposited the said note of Rosenblatt & Brothers, and another note for about \$700, loaned to Fisher by Stross & Brothers, as collateral security for the discount.

When Fisher exchanged notes with Rosenblatt & Brothers, or shortly thereafter, he deposited with them, as security for the payment of his own note to them, certain business paper to the amount of \$814, which had not matured at the time the assignment was executed. No reference was made to these securities in the assignment.

The debt due to Hamburger was not entered on Fisher's

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account books, and this circumstance, together with some whispering between Fisher and Hamburger in respect to the loan of \$100, induced the clerk of Fisher, who was principally relied on by the plaintiffs to prove the case for them, to suspect the good faith of the preference. This clerk also knew that Rosenblatt & Brothers had security for the payment of the note for \$920 to the extent of \$814, and the preference of the sum mentioned in the assignment in their favor without any reference to the securities which they held, afforded also some reasonable grounds for suspicion as to the nature of this transaction. It would have been a very proper course for the assignment to have mentioned the securities held by Rosenblatt & Brothers, which would have discharged the preference in their favor, if paid. It is not, however, inconsistent with entire honesty and good faith to have omitted any reference to the subject. The securities were not certain to be paid, but if they were paid, the debt was extinguished to that extent. If they were not paid, Rosenblatt & Brothers were justly entitled to payment out of the assigned estate.

There does not appear to have been any act or declaration of Fisher or of Rosenblatt & Brothers, showing an intent to collect the securities, and also to hold the preference. There was no concerted action between the parties previous to the assignment, as would probably have been the case had the parties designed to defraud. The carelessness with which the assignment was prepared and executed as between the defendants, in respect to this preference and the securities which Rosenblatt & Brothers held, gave rise to reasonable doubts on the part of creditors as to the good faith of the parties, and sufficiently justifies the appeal to the court to make inquiry as to the alleged fraud, and warrants a denial of costs to the defendants on dismissing the complaints in these actions.

The complaints are therefore dismissed without costs to either party as against the other.

[NEW YORK SPECIAL TERM, April 27, 1860. *Leonard*, Justice.]

ANONYMOUS.

Proceedings supplementary to execution cannot be had upon an execution issued by a county clerk, on a justice's judgment for less than \$25, of which a transcript has been filed in the county clerk's office.

APPPLICATION at chambers for an order supplementary to execution.

N. P. Hinman, for application.

PECKHAM, J. This is an application for a supplementary order upon an execution issued by a county clerk upon a justice's judgment for less than \$25, a transcript thereof having been filed. Section 248 of the code of 1848 enacted that "whenever an execution against property of the judgment debtor issued to the sheriff of the county where he resides, or, if he reside out of the state, to the sheriff of the county where the judgment roll is filed, shall be returned unsatisfied in whole or in part, the judgment creditor may obtain an order, &c."

By the provisions of the revised statutes it was made the duty of a justice of the peace, on the demand of any person, in whose favor he shall have rendered judgment *for above twenty-five dollars*, exclusive of costs, to give a transcript of such judgment. The next section makes it the duty of the clerk to file the transcript, and enter a judgment thereon, and makes that judgment of the same force, as if rendered in a court of common pleas. (2 R. R. 247, 8, §§ 128, 129.) If the first section applied to a justice's judgment, it will be perceived that no proceedings of this character could be had thereon, where the judgment, exclusive of costs, did not exceed \$25, as no transcript was authorized of any other. But it has been supposed that a change in that respect worked a change also in the power to take supplementary proceedings.

In 1849 the legislature enacted that a justice should "give a transcript of a judgment, without reference to the amount,

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and from the time of its docket it should be a judgment of the county court." It also provided for filing a transcript of that judgment in any other county, with the like effect, &c. thereon; "but no such judgment for a less sum than \$25 shall be a lien upon, or enforced against, real estate." (3 *R. S. 5th ed. p. 496, § 63.*) This alteration had reference solely, and it was its single purpose, to enable a creditor for less than \$25, on a justice's judgment, to issue execution against the debtor's personal property to any county in the state, where a transcript thereof was filed, or a transcript of the docket thereof was filed, without being compelled to recover a judgment again in a justice's court.

By section 292 of the code of 1849, it is provided that "when an execution against property of the judgment debtor, or of any one of the several debtors in the same judgment, issued to the sheriff of the county where he resides, or has a place of business, or, if he do not reside in the state, to the sheriff of the county where a judgment roll or a transcript of a justice's judgment for \$25, or upwards, exclusive of costs, is filed, is returned unsatisfied in whole or in part, the judgment creditor is entitled to an order" supplementary, &c. This is the only section that speaks in terms of supplementary proceedings being taken for the collection of judgments of a justice's court, and it gives authority therefor only where the judgment, exclusive of costs, exceeds \$25. The reference to the transcript of a judgment in this section is not to show the kind of judgment as against a non-resident debtor, upon which the creditor could take proceedings, but the kind of judgment generally, on which relief of this character could be had. The amount of the judgment is repeated for greater caution. This section has been supposed to allow proceedings supplementary against our own citizens, upon a justice's judgment for any amount whatever, but against non-residents only where it exceeded \$25, exclusive of costs. Though this might be in accordance with the technical reading of this section, it does not at all comport with the spirit of the act.

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It would make the legislature of 1849 do what no other legislative body ever did before or since, viz. give more rigorous and harsh remedies against its own citizens than against non-residents. There is no reason for any distinction at all, certainly none for one so absurd. It is not necessary, to bring a subject within the purview of a statute, that every particular of its language should apply to it, provided the intent to embrace it is clear. (*Spraker v. Cook*, 16 N. Y. R. 567; and see *Olcott v. The Tioga Rail Road Co.*, 20 id. 210.)

Before the session of 1849, it is conceded that no proceedings supplementary could be had on a justice's judgment, unless the amount thereof was over \$25. The legislation of 1849, taken together, gave no further remedy. The reason, doubtless, was the same as that forbidding the sale of real estate on judgments for less than \$25 from justice's courts, viz: that the costs of each proceeding would be too great for the amount involved—the same reason that forbade relief on a judgment for less than \$100 in the old court of chancery. Though it was said to be beneath the dignity of the latter court to notice such small controversies.

This application is denied.

[AT CHAMBERS, Albany, June, 1860. *Peckham*, Justice.]

 JOHN WALTON vs. ELLEN M. WALTON.

Where a husband, by his complaint, demands judgment against his wife for a separation from bed and board for ever, without asking for any other relief, or for relief generally, if it appears from the facts stated in the complaint that the plaintiff is not entitled to a judgment for separation from bed and board, he cannot, upon a demurrer to the complaint for insufficiency, have a decree declaring the marriage contract void; notwithstanding the complaint contains allegations which, if proved, would have authorized such a decree upon a proper prayer.

DEMURRER to complaint.

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D. D. Field, for the plaintiffs.

Brown, Hall & Vanderpoel, for the defendants.

SUTHERLAND, J. The plaintiff by the complaint, demands judgment for separation from bed and board for ever. There is in the complaint no demand for relief generally, or for any other relief than judgment of separation from bed and board.

It is almost too plain for discussion, that the plaintiff, on the facts stated in the complaint, is not entitled to the judgment of separation from bed and board. He asks for such judgment on the ground that the conduct of the defendant, since his marriage with her, has been such as to render it unsafe and improper for him longer to cohabit with her. I said, in the case of *Auld v. Auld*, decided by me at special term, in September, 1859, that to authorize a decree of separation for cruel and inhuman treatment, "the proofs should show either actual bodily violence, or such conduct, acts, or threats, on the part of the husband, as might render it unsafe for the wife to continue to cohabit with him; and that the word *unsafe*, as used in the statute, (3 R. S. 5th ed. 237, 238, § 64,) has reference to bodily, personal injury or violence and physical health, as distinguished from mere mental suffering or wounded sensibilities;" citing as authorities for the proposition, *Bishop on Mar. and Div.* §§ 454, 459; *Whispell v. Whispell*, (4 Barb. 217;) *Mason v. Mason*, (1 Edw. Ch. 278.)

The proofs to establish the bodily violence or apprehended danger, should at least be as strong, when the husband is the complainant, as when the wife is the complainant. Section 65 of the statute (3 R. S. 238) says, that the complaint in such case shall specify particularly "the nature and circumstances of the complaint" relied on, and "shall set forth times and places with reasonable certainty." The only allegations in the complaint in this case, at all

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pertinent to the relief, and the only relief asked for, to wit, a judgment of separation, are the 11th and 16th. The first, is a mere general allegation of improper conduct on the part of the defendant; in the use of coarse and approbrious epithets towards the plaintiff (without specifying them;) in accusing him of crime and of improper intimacy with other women, and in giving away to fits of violent rage, and with coarse and violent language ordering the plaintiff's friends to leave the house. The 16th allegation is a mere general allegation that the plaintiff is constantly in danger from the defendant and her son Charles; and that "they are striving to deprive him of his property, and to do him some bodily harm," without alleging any facts or circumstances to show that the plaintiff had reasonable grounds to apprehend bodily harm from the defendant, or the defendant and her son, or that it would be unsafe and improper for him longer to cohabit with her.

The statute requires these facts and circumstances to be stated in the complaint, with reasonable certainty as to times and places. It is therefore no answer to the demurrer to say that the code has provided a mode for making the complaint more definite and certain. It is matter of special statutory regulation, and therefore I do not think that the general provision of the code affects the question. (*See remarks of Judge Parker in Whispell v. Whispell*, 4 Barb. 218.)

It is plain then, I think, that the complaint does not contain facts sufficient, if proved, to authorize the judgment of separation asked for.

But it is insisted, on the part of the plaintiff, that conceding the complaint does not contain facts sufficient to authorize the judgment of separation asked for, yet that it does state facts to authorize a decree for the nullity of the marriage contract, and that the plaintiff is entitled to such decree *in this action*.

The complaint alleges that at the time of the plaintiff's marriage to the defendant, she represented to him that she

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was a widow; that she had been married twice; that her husbands were both dead. The complaint then alleges that the plaintiff, after his marriage to the defendant, was informed and believes that such representations were untrue, and made to deceive and inveigle the plaintiff into a marriage with her; that she was married three times before the plaintiff's marriage with her; first to one Jeffards, second to one Hamilton Morrison, lastly to one Russell; and that at the time of the plaintiff's marriage with her, her second husband, Hamilton Morrison was and is still living, in the state of Ohio.

Assuming that these allegations, if proved, would have authorized a decree declaring the marriage contract with the plaintiff void, had the complaint asked for such a decree, or even for general or other relief, either upon the ground of fraud, or upon the ground that she had a husband living at the time of her marriage to the plaintiff, yet as the complaint asks for a judgment of separation only, without a prayer even for other relief generally; the question is, whether the fact that the complaint contains these last allegations, is an answer to the defendant's demurrer, that the complaint does not contain facts sufficient to constitute a cause of action. I think not. The plaintiff has not answered the demurrer.

The § 275 of the code is: "The relief granted to the plaintiff, *if there be no answer*, cannot exceed that which he shall have demanded in his complaint; but, *in any other case*, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

Suppose I should give judgment for the plaintiff on this demurrer, with leave for the defendant to answer in 20 days, and the defendant should not avail herself of the permission to answer, and should never put in an answer; this section of the code would appear to prohibit the plaintiff from having a decree of nullity on this complaint, because the relief asked for by it is limited to a judgment of separation; and I have shown that he would not be entitled to a judgment

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of separation, because the facts stated in the complaint are not sufficient to authorize such judgment.

It would appear to follow, that the defendant must have judgment on her demurrer; but the plaintiff may amend his complaint in twenty days on payment of costs.

[NEW YORK SPECIAL TERM, June 4, 1860. *Sutherland, Justice.*]

THE PEOPLE, *ex rel.* William Mitchell, *vs.* ROBERT T. HAWS,
Comptroller, &c.

The act of the legislature, of April 16, 1852, allowing the board of supervisors of the city and county of New York to raise by tax and pay such additional annual compensation to the justices of the supreme court, resident in the first judicial district, as they might deem proper, so far as it authorized, or was intended to authorize, the raising and payment of such additional compensation to the justices of that district, elected prior to the passage of the act and in office when it was passed, and during the terms for which they had been severally elected, was unconstitutional. And the same, and the resolution of the board of supervisors, subsequently passed, giving an additional compensation to the justices of the supreme court in the first district, were without force, and inoperative as to the justices then in office, and did not authorize the payment of any amount to either of them.

DEMURRER to a return to an alternative mandamus.

B. D. Silliman, for the relator.

H. H. Anderson, for the comptroller.

SUTHERLAND, J. The question in this case is raised by the relator's demurrer to the return of the comptroller to an alternative writ of mandamus, requiring him to draw and sign his warrant on the chamberlain of the city, for the payment to the relator of \$8250, alleged to have been audited

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and allowed, and to be due to him, as a justice of the supreme court, or to show cause, &c.

The relator was elected a justice of the supreme court prior to the year 1852; and during that year and subsequently, until the first day of January, 1858, (on which day the term for which he was elected expired,) was a justice of the supreme court, resident in the first judicial district. The compensation allowed to justices of the supreme court by a general law, at the time of the relator's election, was \$2500 per annum, and this compensation was paid to and received by the relator, during his term of office, and up to the first day of January, 1858. On the 16th of April, 1852, the legislature passed an act to the effect, that the board of supervisors of the city and county of New York might raise by tax, and pay to the justices of the supreme court resident in the first judicial district, such additional annual compensation as they might deem proper. The board of supervisors thereupon passed a resolution giving an additional annual compensation of \$1500 to the said justices. In the tax levy for the city and county of New York, provided for by act of April 19th, 1859, among sundry sums of money, the said board of supervisors were authorized to raise by tax in the usual way, for arrearages of 1858, the sum of \$41,189, which sum was made up in part of the sum of \$8250, so alleged to be due and payable to the relator as extra compensation under the said resolution of the board of supervisors, and of other sums alleged to be due and payable to Justices Edmonds, Edwards and Roosevelt, under the same resolutions and as like extra compensation; and when the said alternative mandamus in this case was granted, the taxes so authorized by the act of April 19th, 1859, were mostly collected and paid. The board of supervisors on the 16th day of August, 1859, passed a resolution, auditing and allowing the bill of the relator for \$8250, for such additional annual compensation as justice of the supreme court of the first judicial district up to 1st January, 1858, and directing the comp-

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troller to pay the relator the sum so allowed, as such "additional annual compensation." Demand was made by the relator on the comptroller in March, 1860, that he should pay the amount so allowed to the relator; and also that he should draw and sign his warrant on the chamberlain for the payment of that sum; but the comptroller refused, until the right of the relator to the money should be judicially determined.

To an alternative writ of mandamus, reciting substantially these facts, the comptroller makes a return admitting all the matters of fact set forth in the writ, but insisting that the act of the legislature of the 16th of April, 1852, allowing the board of supervisors to raise by tax and pay such additional annual compensation, so far as it authorized, or was intended to authorize the raising and payment of such additional compensation to the relator and other justices resident in the first judicial district, elected prior to the passage of the act and in office when it was passed, and during the terms for which they had been severally elected, was and is unconstitutional; and that the same, and the said resolutions of the board of supervisors, were wholly without force and inoperative as to the justices last mentioned, and did not and do not authorize the payment of any amount to either of the said justices. To this return the relator demurred.

The section of the constitution containing the provision referred to and insisted upon by the comptroller, as prohibiting the passage of the act in question, so far as it applied, or was intended to apply to justices elected prior to the passage of the act and in office at the time of its passage, is as follows: "The judges of the court of appeals and justices of the supreme court, shall severally receive at stated times for their services a compensation to be established by law, *which shall not be increased or diminished during their continuance in office.*" The question then presented by the demurrer is, whether the act authorizing the payment of the additional compensation is constitutional, as to the relator

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and other justices of the first judicial district in office when the act was passed.

This was the only question argued before me, and is the only question in the case; for the resolution of the board of supervisors allowing the additional compensation, on the relator's own case, must be assumed to have been passed by the authority of the statute. It has not even been claimed on the part of the relator, that the board of supervisors, independent of the statute, was authorized to pass either of the resolutions above referred to. The only question then, that I shall consider or decide, is, whether the act is constitutional, so far as it authorizes, or was intended to authorize, the board of supervisors to raise by tax and pay an additional annual compensation to the relator and other justices of the first judicial district, in office at the time of its passage.

Constitutional questions demand careful consideration. It is a grave matter to pronounce a law unconstitutional; but when the purpose or intent of a constitutional provision has been clearly ascertained, it is the plain duty of the court to see that such provision is neither defeated nor evaded. Why then was the constitutional provision, that the compensation to be established by law for judges of the court of appeals and justices of the supreme court, "shall not be increased or diminished during their continuance in office," inserted in the constitution? What was, and is, its purpose or intent? On the part of the relator it is insisted that this provision was intended merely to protect the treasury of the state; and as the additional compensation to the justices of the first judicial district by the act and resolutions in question, is not to be paid out of the treasury of the state, but is to be paid by the authorities of the city and county of New York, *directly, and without going into the treasury of the state*, out of moneys raised by tax on property taxable in that city and county alone, it is further insisted, that the payment of such additional compensation even to the justices in office at the passage of the act by force and authority

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of the act, would not at all interfere with the proposed object or intention of the constitutional provision.

If this provision was intended merely to protect the treasury of the state, as the act calls for nothing from the treasury of the state, I do not see how its constitutionality could be questioned. But was the provision intended merely to protect the state treasury? In terms it is a restriction on the legislature. Was it intended to merely protect the treasury of the state from the legislature? Had the words of the provision been "shall not be increased," &c., and not as they are, "shall not be increased or *diminished*," &c., it appears to me that you could not say, with any propriety of language, that it was intended to protect the treasury. An increase of salaries would have called for, and we must assume would have been followed by, a corresponding increase of taxation; and thus as much additional money would have flowed into the treasury as flowed out of it, and the treasury would be kept even. I do not see how even an increase of the salaries of any state officer or officers can be considered an attack on the treasury of the state, although I can see how it might be on the tax-payers. But I do not see how it can be said that this provision of the constitution was intended to protect the tax-payers; for it not only forbids an increase but also a *diminution* of the compensation "to be established by law during," &c., and it would be absurd to say, that the diminution was forbidden with intent to protect either the tax-payers or the treasury. Besides, the increase or diminution is only forbidden "*during their continuance in office.*" These words, I think, show conclusively, that it was not the main object and purpose of the provision to protect either the treasury or the tax-payer. If that was its object and purpose, why did it not absolutely forbid an increase of the "compensation to be established by law," instead of limiting the prohibition to the continuance in office.

There are provisions in the constitution, put there to protect the state treasury; such as § 8, of art. 7, which forbids

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paying money out of the treasury except under legislative appropriation. There are numerous other provisions to protect the tax-payer; such as § 9 of the same article, which forbids the loaning of the credit of the state to individuals, associations, &c.; §§ 10, 11 and 12, of the same article, limiting the power to contract debts; and §§ 13 and 14, regulating the power to impose taxes, &c. But it is quite clear to me, that the provision of the constitution in question, was not put in the constitution either to protect the state treasury or the tax-payer, although incidentally and to a certain extent it may protect both.

A careful examination of the question has convinced me, contrary to the impression left upon my mind by its argument in this case, that the main object and purpose of putting this provision in the constitution was to secure the independence and integrity of the judges and justices during their continuance in office—to protect *them* from the legislature, not the state treasury, or the tax-payer; so that they could and would firmly discharge their duties, without the fear of a reduction, or the favor of an increase of their salaries, by the legislature, during their continuance in office. This is shown, I think, not only by the fact, that the provision, in terms, applies only to judges and justices after their election to office, and *during their continuance in office*, but is most consistent with the history and general frame of these written constitutions of government.

The history of the written constitutions, which resulted from the revolution, shows, that it was the intention in framing them to make the executive, legislative and judicial powers, or departments of government, not only independent of each other, but checks upon each other. These constitutions were not only grants of power, but regulations of granted power. Besides numerous express restrictions, and a qualified veto provided by them as checks upon the legislative power, it necessarily followed, from the very frame of these constitutions, that the judicial power was the ultimate check

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upon both the legislative and executive powers; for these constitutions were to be construed; and from the very nature of the duty, it became the province and duty of the judges to construe them; and behind the construction of the ultimate court having jurisdiction of the question and of the parties, there lies only obedience or revolution.

Our state constitution of 1846 seems to have been framed in a spirit of increased distrust of the legislative power. The express restrictions on the legislature in it, are much more numerous than in either of the previous constitutions. Besides these express restrictions, there are certain limitations of the legislative power granted, necessarily to be implied from the purposes and object of civil government, and from the fact that the legislative power is granted.

Now, as an act of the legislature not authorized by the constitution, if it escapes the executive veto, if questioned, has yet to pass the judicial scrutiny, is it extraordinary that the same constitution which contains these increased express restrictions on the legislature, and makes the judges and justices elective for short terms, should provide that the salaries of the judges and justices should neither be "increased nor diminished during their continuance in office," so that they could be neither starved nor induced into a pliant adoption of a construction by the legislature of the constitutional restrictions and limitations of its own power?

These considerations lead me to the conclusion that the main purpose and object of this constitutional prohibition of an increased compensation during the continuance in office only, and of course only after a judge's or justice's election, was intended to prevent the judges of the court of appeals, and the justices of the supreme court, from being placed under obligations to the legislature.

There is nothing in the constitution preventing judges or justices from receiving presents or gifts from individuals, or corporations, private or municipal. If the supervisors of the city and county of New York, or the common council of

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the city of New York, had undertaken by resolution or ordinance, *without and independent of any act or authority of the legislature*, to pay the justices of the supreme court of the first judicial district an increased annual compensation, certainly this constitutional provision would have had nothing whatever to do with the question of the legality or validity of such resolution or ordinance even as to the justices then in office; for it is plain that the constitutional provision is, and was intended to be, a mere restriction on the legislature only. But it appears from the resolution of the board of supervisors of the 16th of August, 1859, auditing and allowing the claims of the relator and others for additional compensation, that such claims were presented, and audited, and allowed, and directed to be paid, in *pursuance* of the act of the legislature, and of the resolution of the board of supervisors of Dec. 27th, 1852; and the relator's whole case and right, as presented in the alternative writ of mandamus, and by the argument of his counsel before me, is founded and proceeds upon the theory, that the resolution of Dec. 27th, 1852, was passed by authority of the act of the legislature; and the comptroller assuming this, as he had a right to assume on the relator's own case, in his return sets up and insists upon the unconstitutionality of the act, as to the relator and other justices elected prior to, and in office at the time of its passage.

It is plain then, that I am not permitted to speculate on the question, whether the board of supervisors by virtue of general authority, or under general laws, had authority to pass the resolutions; or whether the city of New York, as a corporation, under its charter or otherwise, without and independent of any special act or authority of the legislature, would have had a right to raise and pay the additional compensation; but that in deciding the question of constitutionality, I must assume that the resolutions of the board of supervisors were passed by force and authority of the act in question; and if the increased compensation claimed by the

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relator is paid to him, that it must be paid to him by force and authority of the act.

This being so, it follows, if the views above presented as to the purpose and object of the constitutional provision relied upon by the comptroller are correct, that the act is unconstitutional, and the resolutions passed or purporting to have been passed by its authority void, as to the relator and other justices of the first judicial district, in office when the act was passed. If the constitutional prohibition of an increased compensation "during their continuance in office," was intended to prevent the justices from being placed under obligations to the legislature, or to a legislature, during their terms of office; and the increased compensation claimed by the relator and others in office when the act was passed is claimed by them, and if paid, is to be paid under and by authority of the act; does it not follow that the act is unconstitutional as to the relator and such other justices? What difference does it make to the relator, whether his increased compensation is paid to him by the comptroller or chamberlain of the city of New York, or the comptroller or treasurer of the state. If he is paid by the comptroller or chamberlain of the city of New York, *by force and authority of the act*, he is just as much indebted to the legislature for his additional pay as though he received it from the comptroller or treasurer of the state.

It is clear then, that the act in question, so far as it was intended to authorize an additional compensation to the relator and other justices of the first judicial district, in office when passed, was within the mischief intended to be remedied or prevented by the constitutional provision, if I am right in my view of its purpose and object.

If as was suggested on the argument, and as the history of the legislation as to judges' salaries in this state prior to the constitution of 1846 might lead one to suppose, the constitutional prohibition of increased compensation was intended not only to make the judges and justices independent of

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the legislature, but to relieve the legislature from their solicitations for an increase of salaries, it as clearly follows from the views that have been presented, that the act in question was and is within the mischiefs intended to be remedied or prevented by the constitutional prohibition, so far as the act was intended to apply to and benefit justices in office at the time of its passage and during their continuance in office!

It has been suggested if the act in question, so far as it authorizes increased compensation to the justices of the first judicial district then in office is unconstitutional, that the authority given by another section of the act to pay justices from other districts assigned to perform judicial services in the first judicial district under the act, is and must be also unconstitutional. I think not, even as to justices of other districts then in office. The services to be performed by justices from other districts are extra services, out of their districts, and over and above such as they were elected to perform in their districts. The \$8 per day allowed them by the board of supervisors under the act for the services, places them under no obligations either to the legislature or the city—for the extra pay, they do extra work. But if the increased compensation is paid to the relator and other justices of the first judicial district elected prior to the act, it is to be paid to them for the services which they were elected to perform, and which they would have performed had the act authorizing the additional compensation never been passed.

My conclusion is that the comptroller must have judgment on the demurrer with costs.

[NEW YORK SPECIAL TERM, June 4, 1860. *Sutherland*, Justice.]

BIRDSEYE, Receiver, &c. *vs.* SMITH.

82b	217
67 AD	597

In an action brought by the receiver of an insolvent and dissolved corporation, upon a promissory note given to the corporation, the plaintiff, in the first count of the complaint, alleged that the note was executed and delivered to the company, by the defendant, as and for a part of its capital stock. The second count was upon the same note, alleging it to have been given for the premium upon a policy of insurance, and as an agreement to contribute ratably to the losses and expenses of the company. *Held*, that the complaint was not unnecessarily repetitious in its statements, and did not violate any provision of the code. Order made at special term, requiring the plaintiff to elect upon and for which of the two causes of action he would proceed, reversed.

A PPEAL from an order of Judge BACON, requiring the plaintiff to elect upon and for which of two causes of action set forth in the complaint he would proceed.

F. Kernan, for the appellant.

M. H. Throop, for the respondent.

By the Court, ALLEN, J. The two counts in the complaint are upon the same written agreement or promissory note of the defendant. The action is brought by the plaintiff as receiver of the Utica Insurance Company, an insolvent and dissolved corporation. The first count is upon the note of the defendant, given to the company, alleging it to have been executed and delivered to the company as and for a part of its capital stock; and the second count is upon the same note, alleging it to have been given for the premium upon a policy of insurance and as an agreement to contribute ratably to the losses and expenses of the company. Each count contains the requisite allegations to sustain an action upon the note. If the question were *res nova*, I should be inclined to greater liberality in the construction of the code in tolerating "without unnecessary repetition" statements of the same cause of action in different forms, or different causes of action arising out of the same transaction, than the report-

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ed cases seem to warrant. Several statements of the same cause of action, substantially the same, and differing only in form, are not necessary. But when the statements differ materially and in substance, and are not unnecessarily inserted and cannot mislead the defendant or embarrass the defense, but are only inserted from the caution which every good practitioner finds it necessary to exercise to guard against the infirmities of human memory and the defects of human testimony, I would allow them to stand as not "unnecessary repetitions." In this case no injury can happen to the defendant, and it is not possible that he should be embarrassed in his defense by permitting the two counts to stand. The note, in the absence of evidence that it was one of the original notes of the company, will be presumed to have been received as a premium note, and the defendant held only to the liabilities incident to a contract of that character. The two counts are not inserted to meet a possible variance in the statement of a single cause of action, but to sustain two distinct and different claims. The fact that they are based upon the same instrument does not affect the question.

Section 142 of the code of procedure has received a construction in several reported cases, to which reference will be made hereafter. With the decisions actually made in those cases I have no fault to find. But the grounds upon which some of the decisions have been placed, have led to the conclusion that the code absolutely prohibits more than one count upon the same instrument or transaction; that it forbids the party under all circumstances from providing against the contingencies and uncertainties incident to all litigation, by asserting different claims arising out of the same transaction when he can have but a single good cause of action. The code, in another section, provides that several causes of action may be united when they all arise out of the same transaction, or transactions connected with the same subject of action. (*Code*, § 167.) But this, read in connection with § 142, is claimed to authorize only the joinder of such causes

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of action as may stand with each other, and all be sustained. The section last named requires the complaint to contain "a plain and concise statement of the facts constituting a cause of action without unnecessary repetition." Courts of common law and of chancery have ever required substantially the same. At common law, pleading is defined to be "the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action or the defendant's ground of defense;" and the "facts should be stated logically in their natural order and with certainty, precision and brevity." (1 *Ch. Pl.* 213, 232.) A bill in equity should contain "a clear and exact statement of all the material facts." (*Story's Eq. Pl.* § 23.) The code calls for this and no more, and the subdivision of § 142, under consideration, does not relate to the joinder of different causes of action, but to the form of the statement of a single cause of action. It makes provision for a perfect complaint containing a single cause of action, or a perfect count in a complaint embracing more than one cause of action. The question under this provision in all cases is, whether the facts constituting a single cause of action are stated without "unnecessary repetition." The statute is directory, and it is left to the courts to see that the pleader confines himself within reasonable limits. They are not on the one hand to be hypercritical and endanger the plaintiff's interests by an unyielding and rigid rule, or on the other to allow the record to be encumbered with clearly repetitious and irrelevant statements, or the defendant to be embarrassed by an improper latitude in the claim made. It is not claimed that a defendant may not set up by answer as many different defenses as he may have, or a defense growing out of the same transaction in as many different forms as he pleases, and they cannot be stricken out except as false. (*Ostrom v. Bixby*, 9 *How.* 57. *Hackley v. Ogmun*, 10 *id.* 44. *Mott v. Burnett*, 2 *E. D. Smith*, 50.) The code forbids all repetition in the statement of the new matter constituting a defense. (*Code*, § 149.) The language is substantially the

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same as that prohibiting repetition in a complaint, but this does not prohibit the setting up of even the same defense in several forms, stating them separately in such manner that they may be intelligibly distinguished. (*Code*, § 150.) In some cases the common law rule prohibiting inconsistent pleas has been repudiated under the code, and in compelling defendants to elect between defenses, the rule in chancery adopted, that a defendant could not be compelled to elect between defenses alleged to be inconsistent, except when the proof of one must necessarily disprove the others. (*Hollenbeck v. Clow*, 9 *How.* 289.) The code gives ample power to the court to suppress all unnecessary repetition in pleadings, by striking out all irrelevant and redundant matter. (*Code*, § 160.) The remedy for a misjoinder of causes of action is by demurrer, (*Code*, § 144.) And in *Sweet v. Ingerson*, (12 *How.* 331,) a demurrer to a complaint was sustained for a misjoinder of causes of action. One cause of action as alleged was upon contract and the other for deceit, and they did not belong to the same class of actions as they are classified by § 167 of the code and in *Coster v. Drew*, (5 *Duer*, 677,) *McIntosh v. McIntosh*, (12 *How.* 289.) The cases in which motions to elect between inconsistent claims have been entertained, have been those in which the claims alleged to be inconsistent were set forth in the same complaint. (*Smith v. Hallock*, 8 *How.* 73. *Young v. Edwards*, 11 *id.* 201. *Linden v. Hepburn*, 3 *Sandf.* 668. *Lamport v. Abbott*, 12 *How.* 340.) In the case before us the two causes of action are inconsistent, in that they cannot stand together, that is, both cannot be sustained; and if this constitutes a good objection to the complaint, it must be taken by demurrer. I doubt if a demurrer would lie. The two causes of action belong to the same class, and both arose upon contract. But it is not necessary to decide that question. There is no "unnecessary repetition" here. 1st, There is no repetition of the causes of action. It is conceded that each count sets forth one well founded cause of action. 2d, There is no

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repetition of any facts, except as to the facts common to the two causes of action, and as to them it was not necessary to repeat them in each count in order to make a good count, perfect in itself; and there is no complaint of this, if the plaintiff cannot be compelled to elect between the two counts. This is not the case of several counts varying each from the other in matters of form, and all stating the same cause of action in different ways, to meet a possible variance between the case made and the proof. Such repetitions of the facts and the same causes of action would be unnecessary, for the reason that mere variances are to be disregarded, or amended upon the trial. But the plaintiff could not amend his complaint in this action if it contained but a single count, by changing the cause of action to supply the want of another count, for they are entirely different. (*Code*, § 173.) Unless there is a necessity imposed by the code, it would not be right to compel the plaintiff to elect between the two counts, when such election may lead to two successive actions to determine the rights and liabilities of the parties upon a single instrument; and in the mean time the receivership of the plaintiff must be continued, and the creditors of an insolvent corporation must await the event of the last action. There is certainly no case that has come under my observation that has come directly to the point condemning this complaint, and which would compel the plaintiff to elect between the two causes of action. The cases, it is true, are somewhat numerous, bearing more or less remotely upon the question, and most of them have been decided by the same learned justices, and all correctly decided. In all, the causes of action were unnecessarily repeated in the complaint, but in none did the question presented here arise. In *Stockbridge Iron Company v. Mellen*, (5 *How.* 439,) the same contract was set out in six different forms. In *Sipperly v. The Troy and Boston Rail Road Company*, (9 *id.* 83,) the plaintiff upon precisely the same facts claimed single and treble damages in distinct counts. Here the facts are not the same in sub-

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stance in both counts. In *Churchill v. Churchill*, (9 *How.* 552,) the counts were upon the same cause of action. There was evidently no necessity for a number of counts, as any departure in the proof from the allegations of the complaint would have been a mere variance, and amendable. The reasoning of the judge would reach this case; but as the words of the code do not in terms restrict a party to a single count upon the same transaction, I cannot yield to the suggestion that the theory of the code is that a party must necessarily know his case and to what the witnesses will testify. It would certainly be absurd, as applied to a party suing or defending, in a representative capacity. *Dunning v. Thomas*, (11 *How.* 281,) and *Ford v. Mattice*, (14 *id.* 91,) are like *Stockbridge Iron Company v. Mellen*, (5 *id.* 439.) *Mayhew v. Robinson*, (10 *id.* 162,) decided by Judge S. B. Strong, was in principle like the cases last cited; and *St. John v. Pierce*, (22 *Barb.* 362,) arose upon demurrer, and need not be considered. I am of the opinion that the complaint, in its present form, is not unnecessarily repetitious in its statements, and does not violate any provision of the code. The order made at special term should be reversed, and the motion denied without costs.

[ONONDAGA GENERAL TERM, July 8, 1880. *Allen, Mullin and Morgan*, Justices.]

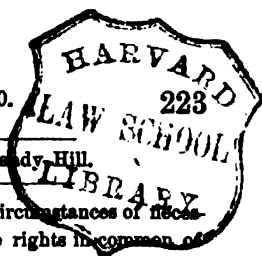
PETER G. COOPER and others *vs.* THE TRUSTEES OF THE
FIRST PRESBYTERIAN CHURCH OF SANDY HILL.

A religious corporation, through its trustees, who are by statute invested with the temporalities of the corporation, has the right to regulate the use of the meeting house, to make repairs, alterations and improvements; and the pew-owners take and hold their privileges in subordination to the rights of the corporation.

A pew-owner has no separate or individual property in the timber or materials of which the house, or any of its parts, is composed, or in the soil below the pew, but his right is that of occupancy of the pew during public

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worship; and this right of occupancy must yield to circumstances of necessity, convenience and expediency, growing out of the rights in common of the society.

Although the change in the internal arrangement of a church edifice is merely expedient, or matter of convenience to the society, still the trustees, in behalf of the corporation, may legally direct the alteration, and the pew-owners who shall be deprived of their rights in their pews, must be content with a just and adequate compensation.

The right of a pew-owner, not being absolute, but qualified by, and subject to, the right of the trustees to alter the internal arrangement of the church as the good of the society may require, no constitutional objection arises when, in the exercise of such right by the trustees, the pew is destroyed from necessity, or for purposes of expediency or convenience.

Although there is a presumption in favor of the acts of trustees, as agents or officers of the corporation, yet pew-owners will not be *concluded* by the exercise of an arbitrary and despotic will, on the part of the trustees, in determining the question of necessity, expediency and convenience.

They must carry out the reasonable and legal will and wishes of the corporation. They will be presumed to do this, in regard to repairs, improvements and changes made on the church property, in the absence of any allegation that they are acting against the will and wishes of the body they represent.

MOTION, upon complaint, affidavits, &c. for an injunction.

Orville Clark, Urias G. Paris and A. D. Wait, for the plaintiffs.

Hughes & Northup, for the defendants.

BOCKES, J. This is a motion for an injunction, by six pew-holders in a church, to restrain the trustees from removing their pews and erecting slips or other structures in their place.

This motion must be determined on the papers before me, which show that the paper title to the premises on which the church edifice is situated still remains in the original patentees of the township. The lot, previous to and until 1825, had been used as a public burying ground; and, as was held in *Hunter v. Trustees of Sandy Hill*, (6 Hill, 407,) was dedicated to public use. In that year, one Gibson erected the

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church edifice on this lot, with the purpose and on the understanding with a number of the inhabitants of the vicinage, that it should be a house of public worship, and Gibson was to be reimbursed for his outlay by a sale of the pews and slips. After the edifice was completed, Gibson gave to the purchasers of the pews and slips, certificates or deeds of sale therefor, and such purchasers and their assignees and grantees have ever since occupied them for purposes of public worship. The form of these certificates or deeds is not given—hence the precise nature and extent of the right intended to be granted to the pew and slip-holders, do not with certainty appear—but it is alleged that the purchasers and those claiming under them occupied the pews and slips, claiming title thereto “for the purpose of public worship.” The religious society worshipping in this house, organized at a meeting held on the 18th October, 1825, and filed their certificate of incorporation in the clerk’s office of Washington county, where it was recorded on the 13th January, 1826, by which said society became incorporated as a religious society, under the name of “The Presbyterian Church of Sandy Hill.” This certificate of incorporation purports on its face to have been made “at a meeting of subscribers to the church,” and agreeably to the act of 1801, providing for the incorporation of religious societies, and therein Reuben C. Gibson, the person who is alleged to have erected the building, is named as one of the trustees. In 1848, for some reason not appearing on this motion, the society reorganized under the name of “Trustees of the First Presbyterian Church of Sandy Hill.” From the first organization in 1825 to the present time, the temporalities of the church have been managed and conducted by trustees, elected from time to time, and their possession of the church edifice and the rights of the pew and slip-owners therein have been, in practical observance, the same in all respects as in those cases where the title was in the corporation.

It is clear that the premises embracing the church edifice

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were dedicated to the public for a definite, legal purpose, and having been held and enjoyed by the society in its corporate capacity since 1825, the title, as between the corporation and the pew-owners, must be deemed to be in the corporation, for the purposes of the organization.

So far as this case is concerned and for the uses to which the real estate has been for thirty-five years appropriated, the title of the patentees must be deemed subservient to the claim and rights of the incorporation. Especially must this be so held in the absence of any claim by the patentees or of any one claiming under them. And as regards Gibson, who in fact had no title whatever, all claim from and under him must be held subservient to the rights growing out of the common and public purpose, carried into effect through him, and consummated by the incorporation of the society.

There may be a dedication for pious and charitable purposes as well as for highways and other public easements. Judge Beardsley remarks, (6 *Hill*, 411,) "Dedication is the act of devoting or giving property for some proper object, and in such manner as to conclude the owner. The law which governs such cases is anomalous. Under it, rights are parted with and acquired in modes and by means unusual and peculiar. Ordinarily, some conveyance or written instrument is required to transmit a right to real property; but the law applicable to dedication is different. A dedication may be made without writing, by act *in pais* as well as by deed. It is not at all necessary that the owner should part with the title which he has, for dedication has respect to the possession and not the permanent estate."

The edifice was erected with a view of making it common property, for the purpose of public worship, on a lot then dedicated to public use. The society was immediately incorporated. Gibson became one of the incorporators, and with the other trustees had possession, and transmitted possession to his successors; and the corporation has ever since con-

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trolled it as church property. All this is conclusive on the question of general and common intent.

For the purposes of this motion I must regard the title, and the legal possession, of the church edifice to be in the corporation, (1 *Kernan*, 94, 243,) and that the rights of the plaintiff are those ordinarily attaching to pew-owners.

The question is, therefore, whether these pew-owners present a case for an injunction against the corporation, to prevent the demolition of the pews.

Chancellor Walworth, in defining the right of a pew-owner, remarks, that the grant of a pew in perpetuity does not give to the owner an absolute right of property; that the grantee is only entitled to the use of the pew for the purpose of sitting therein during service. It was laid down in *Wheaton v. Gates*, (18 *N. Y. R.* 404,) that the interest of pew-holders did not constitute them owners or part owners of the lot; that such interest consisted in a right to occupy their respective pews, as a part of the auditory upon occasions of public worship. So Judge Hand says, "The pew-owner does not have a right to the soil upon or over which the pew stands, but only a right to use the pew as a seat in a place of public worship, subject to the more general right of the corporation in the soil and freehold." He adds, that "from the very subject matter of the conveyance, the pew-owner must be presumed to have taken it subject to all the conditions and limitations incident to such property."

What then are those condition and limitations? for, on determining them, it may be seen whether the plaintiffs have been or are improperly disturbed in the use and enjoyment of their pews.

The incidents alluded to are those resulting from decay, dilapidation and casual injury to or destruction of the property, and from the right possessed by the corporation to make such proper and appropriate changes and improvements as health and comfort demand. Judge Paige says, "The trustees can, for useful purposes, and to carry out improve-

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ments, take down and remove the pews of the pew-holders. The property of the pew-holders in their pews is necessarily subject to the right of the trustees to alter and improve the internal arrangements of the church as the good of the society may require."

This right to change or take down pews rests in necessity or propriety. If a necessity exists, this right may be exercised without compensation to the pew-holder. There is still a right in the corporation to change or take down pews depending on propriety, which however cannot be exercised without recompense. It was held in *Howard v. First Parish in North Bridgewater*, (7 Pick. 138,) that a parish may take down their meeting house in order to rebuild, either as matter of necessity or of expediency: in the former case they are not, and in the latter case they are, bound to indemnify the pew-holder for the loss of his pew. In this case the court remarked, that "although the parish have a *right to take down* a meeting house which may be in *good condition*, in order to build one in better taste or of larger dimensions, yet in such case they must make compensation." So, too, it was held in *Gay v. Baker*, (17 Mass. R. 435,) that a parish might, "when necessary, take down the house and rebuild on the same ground, or may alter the form and shape of it for the purpose of making it more convenient. If in doing this the pews are destroyed, the parish must provide an indemnity for the pew-holders on just and equitable principles; it being a necessary condition of the property in a pew that it shall be subject to the regulations of the parish for useful purposes." The principle of this case is approved in *Wentworth v. First Parish in Canton*, (3 Pick. 344.) Judge Parker remarks: "It is there, in *Gay v. Baker*, intimated that when, by reason of altering or enlarging a meeting house, the pews of an individual shall be destroyed, means must be provided for indemnity, and without doubt this ought to be done in case an alteration takes place for convenience only." And again it was held in *Kimball v. Second Parish in Bow-*

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ley, (24 *Pick.* 347,) that the pew-holder has but a qualified property subject to the paramount right of the parish, and they in their general dominion and superintendence may remove or change the form of the pews for the purpose of making repairs or rendering the interior more convenient, or they may destroy them altogether for the purpose of erecting or substituting a more commodious edifice. But the court adds, that "the pew-owner cannot be despoiled of his property," and holds that he is entitled to compensation, except when the house has become ruinous and unfit for use. The court then proceeds to inquire how the compensation is to be made to the pew-holder, in cases where he is entitled to recompense for the destruction of his pew by the parish. Judge Morton inquires, "How are the parish to ascertain the value of pews that they may give the owners an adequate indemnity? Must they determine for themselves, and act on the peril of a suit from every dissatisfied pew-owner? Can they compel him to receive compensation, and may they make a lawful tender of it?" The judge then proceeds to say, that the statute of that state, passed in 1817, providing for appraisals in such cases, was intended to remedy the inconvenience suggested by these questions, and he held that its terms were broad enough to embrace that case. But the learned judge adds: "Whether this statute applies or not, the defendants are justified in their conduct;" and further—"In the exercise of their rights they had incurred a pecuniary responsibility, and rendered themselves liable to pay plaintiff for his pew, as much as it was worth. Having legally taken the pew by virtue of the power vested in them, and thereby become the legal owners of it, they must be deemed statute purchasers for a fair compensation." This was a case where it appeared, as is expressly stated, that the pew was pulled down for the purpose of making the structure of the pews more convenient, which was expedient, and not from necessity or malice.

The statute alluded to in the last case cited is but declaratory of the common law, as was there directly held—the

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court remarking that parishes, having before the right to remove pews for certain purposes, were not deprived of it by the passage of the statute. They may therefore still rely upon their original right, even if they have the statute right. So, in *Daniel v. Wood*, (1 Pick. 102,) Parker, J. remarks, that the "property in a pew in a meeting house is not absolute, but a qualified property; it is an exclusive right to occupy a certain part of the meeting house for the purpose of attending upon public worship, and for no other purpose, and is necessarily subject to the right in the parish to take down and rebuild the meeting house, and make such alterations as the good of the society may require. This restriction upon the property grows out of the nature of the property and the purposes to which it is applied."

He adds, "this is the *common law* of the land in relation to such kind of property, and by the late statute (1817) this right is recognized and the mode of executing it is established." And he further adds: "Before the statute, the parish or society had a right to take down and rebuild the meeting house. And if the plaintiff has suffered in his property by the destruction of the old meeting house and the erection of a new one, he can have his action on the case; in which he will recover his reasonable damages, or perhaps he may hold a property in the new pews corresponding with his property in the old ones by submitting to his share of the expense." The case of *Wentworth v. Inh. in First Par. of Canton* (3 Pick. 344) recognizes this as the common law applicable to the subject under discussion, as does also the case of *Gay v. Baker*, (17 Mass. B. 434,) where Parker, J. says the statute of 1817 appears to have affirmed these principles.

Without referring to the cases, it is sufficient to say that the same principles obtain in Vermont, in regard to the rights of pew-holders, as in Massachusetts.

I understand Judge Paige to hold the doctrine of these Massachusetts cases when he says the trustees can "for useful purposes, and to carry out the contemplated improvement,

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take down and remove the pews of the pew-holders." He adds—"the pew-holder has a remedy when his pew is destroyed for convenience only." Yet he decides that the pew-holder cannot maintain either trespass or ejectment against the trustees, but the action must be to recover damages by way of indemnity for the loss of his pew. Judge Hand, in reviewing this case, (17 *Barb.* 109,) also recognizes these principles. He says, if the pew is taken "for convenience or for expediency, and not from necessity, the owner has a right to indemnity;" but he nowhere intimates that the corporation has no right to remove pews for convenience or from expediency—only that in such case the owner is entitled to compensation.

It was held in *Bronson v. St. Peter's Church of Auburn*, (reported in the 3d vol. of *Law Reporter*, page 590,) that the pew-owner has no claim that the relative situation of internal positions of the church will not be changed, nor that the church edifice shall remain unaltered. In that case a motion was made for an injunction to restrain the corporation from proceeding with a contemplated alteration of the church edifice, which involved the demolition of pews. Judge Maynard denied the motion, holding that the trustees acting in behalf of the corporation had the right to make alterations under section 4 of our statute in regard to religious corporations, which gives them power "to repair and alter their churches or meeting houses, and to erect others if necessary."

But the right of the corporation to repair, improve and alter the church exists at common law, which is not at all affected by the statute cited.

It follows, therefore, from these authorities, that the corporation through the trustees, who by statute are invested with the temporalities of the church, has the right to regulate the use of the meeting house, to make repairs, alterations and improvements, and the pew-owners take and hold their privileges in subordination to the rights of these corporations.

A pew-owner has no separate or individual property in the

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timber or materials of which the house or any of its parts is composed, but his right is that of occupancy of the pew during public worship, and this right of occupancy must yield to circumstances of necessity, convenience and expediency growing out of the rights in common of the society. These principles are the plain dictates of natural justice and cultivated reason, and are so eminently just in their application, as to seem a necessary concomitant of church property in our country.

The charge in the complaint that the defendants are actuated by malicious motives in removing the pews, and that they have subverted the use of the house from a place of worship into a market and grocery, is fully met and explained by the affidavits read on the motion. At a meeting of the society the trustees were, by a vote thereof, instructed to repair and alter the pews and slips, and they, in pursuance of such instructions and of a resolution adopted by them, proceeded to make the alterations complained of. The trustees allege that in their opinion the change and alterations are necessary to the comfort, convenience and wants of the society; and state the grounds of such belief, which, to my mind, are reasonable and adequate. They deny that they were actuated by malicious motives, but assert their good faith in all they have done or intend to do.

According to the authorities above considered, they are pursuing a perfectly legal course of action; for if the change in the internal arrangement is merely expedient or matter of convenience to the society, still the trustees, in behalf of the corporation, may legally direct the alteration, and the pew-owners who shall be deprived of their rights in their pews must be content with a just and adequate compensation. The rights of all pew-owners in all churches, unless there are some unusual or peculiar circumstances qualifying such rights, are subject to the exercise of this power by the corporate authorities.

It will be readily perceived that the conclusions sanctioned

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by the authorities cited are not obnoxious to the constitutional objection, for the reason, that the right of the pew-owner is not absolute, but is qualified by and subject to the right of the trustees to alter the internal arrangements of the church as the good of the society may require. Therefore, no right of the pew-holder is invaded or taken from him when the pew is destroyed from necessity or for purposes of expediency or convenience.

It becomes important now to inquire how the question of necessity, expediency and convenience is to be settled. Can the trustees determine this, and are all the pew-owners to be concluded by their judgment, or perhaps caprice? Clearly not concluded. There is a presumption in favor of their acts as agents or officers of the corporation, inasmuch as they are invested with the temporalities of the church; but I apprehend they cannot conclude the question suggested, by the exercise of an arbitrary despotic will. They must carry out the reasonable and legal will and wishes of the corporation. They are presumed to do this in regard to repairs, improvements and changes made on the church property, in the absence of any allegation that they are acting against the will and wishes of the body they represent.

It was decided in *Robertson v. Bullions*, (1 Kernan, 243,) and see remarks of Brown J. in *The Parish of Bellport v. Tooker*, (29 Barb. 272,) "that a religious corporation under the statute consists not of the trustees alone, but of the members of the society; that the society itself is incorporated, and its members are the corporation; that the relation of the trustees to the society is not that of a private trustee to the *cestui que trust*, but they are its officers, with the powers of the officers of other corporations.

But passing the fact that this action is against the corporation by its corporate name, and that the acts complained of are alleged to be the acts of the corporation, which presupposes legal unanimity among the incorporators in regard to such acts, how are the wishes and will of a religious corpo-

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ration to be determined? There can be no other way than in some manner to learn the wishes of a majority, and those wishes when known and duly expressed must conclude, unless so palpably unjust as clearly to indicate an arbitrary, wanton and destructive purpose. Judge Harris says, (16 *Barb.* 243,) "It is the right of a majority to control in all civil affairs, and not less in the management of the temporalities of a religious society than any other. This is a cardinal principle in our free institutions. It pervades the whole structure of society. When men differ in opinion, the will of the majority must prevail. The rule is safe and equitable. Sometimes, though not often, the application of the rule results in individual hardship. Sometimes, too, though very rarely, it is necessary to protect the rights of a minority against the arbitrary acts of a majority. But generally, when individuals unite their interests to accomplish a common end, they should expect and be willing that a majority of the associates should govern in all matters of common interest. They may be supposed to enter the society with the knowledge that they are to be governed by this principle." The soundness of these observations and their practical equity must commend them to the conscience and candid judgment of every one. Mr. Justice Davies quotes them with approval in *Wyatt v. Benson*, (23 *Barb.* 335, 6.)

In *Livingston v. Lynch*, (4 *John. Ch. Rep.* 596,) Chancellor Kent lays it down as the well settled law of corporations, that the voice of a majority shall control. The rule is based on grounds of public good and convenience.

The clear expression of the majority of the corporators, therefore, is the will of the corporation—which will is presumed to be manifested by the action of the trustees. When it is desirable to obtain especial sanction for any contemplated proceeding—and it is well to secure such sanction in all matters of importance—the trustees should call a public meeting of the members of the society, and the expression of that meeting, if fairly obtained, would be clear and reliable

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authority on which the trustees might safely act. Then the contemplated alterations and improvements could be discussed and the expenses considered, among which would naturally be such as might be incurred by the necessary removal of or injury to the pew or slip of any member. Generally no expense of this kind would be incurred, for no one would be driven from the church, but a seat or right of occupancy during public worship—which was all any one possessed—would be provided; and if as good and equally commodious and comfortable, although in different form, no claim for damage could be sustained.

In the exercise of its powers, the corporation, through its officers, must act with due regard to the object of the organization, equalizing to the greatest possible extent the privileges and burdens among the members, so as to secure general comfort in the enjoyment of common rights.

If the forgoing conclusions are well based—and they are sanctioned by numerous decisions—the motion for an injunction must be denied.

But there is another unanswerable objection to the motion. The plaintiffs ask for an injunction to restrain the defendants from destroying their pews, and from erecting other structures in their place. But it is shown that the pews were in fact taken down and removed before the commencement of this action; therefore no case for an injunction then existed, or now exists, to prevent the removal of the pews; nor can the plaintiffs enjoin the defendants from erecting other structures, as slips or seats, in the place of the pews removed.

The cases above cited all agree in this—that a pew-holder has no right beyond that of using the pew as a seat in the church edifice. He has no exclusive right in the soil below the pew, or in the timber or materials of which the house or any of its parts is composed; and when this use is destroyed, his right, if any remains to him, is a right of indemnity or compensation for the injury. If the authorities settle any thing, they demonstrate and establish this conclusion.

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A difficulty suggests itself to me in the form of the action, which, however, was not discussed before me, and I shall not therefore take it into consideration in the decision of the motion. But it may be well to draw the attention of the counsel to it at this early stage of the action. Can the plaintiffs join in an action for the relief demanded on the case presented, or can they, being separate pew-holders, join in an action for any relief whatever, based on their rights as pew-holders? It is held in *Shaw v. Bevenidge*, (3 Hill, 26, 27,) that pew-owners hold their particular seats in severalty—that their rights are distinct and separate. Have the plaintiffs a common right, or, do they show more than this, that the defendants have injured and intend further to injure them in their separate rights? (See *Bouton v. The City of Brooklyn*, 15 Barb. 375, also opinion of Judge Hand, in manuscript, in *Judson and others v. Judd and others*.) On this point I intimate no opinion. The motion for an injunction must be denied with ten dollars costs.

[SCHENECTADY SPECIAL TERM, July 23, 1860. Boeckes, Justice.]

SPAULDING vs. STRANG and others.

On the 16th of November, 1854, an agreement was executed by and between B. & F. and certain of their creditors, by which the latter covenanted that in case B. & F. should, on or before the 1st day of December, 1854, execute to S. an assignment of all their property, preferring therein as first class creditors an amount not exceeding \$60,000, and preferring the covenantors to the amount of fifty cents on the dollar on their several claims, they would, on the execution and delivery of such assignment, discharge B. & F. from all liability for the balance of their claims. Assignments of the individual and partnership property of B. & F. were executed by them to S. on the 1st of December, 1854. The assignment of the partnership property contained this recital: "Whereas the said parties of the first part are co-partners in trade in the city of New York, under the firm of B. & F., and are at present unable to pay their debts, and have agreed to assign the property

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hereinafter referred to, for the benefit of their creditors, *in the manner hereinafter mentioned.*" By that assignment, certain creditors representing about \$53,000 of the debts were first to be paid in full; the sixty creditors who signed the agreement of November 16, 1854, representing about \$98,000 of the debts, were next to be paid 50 per cent; and then, if there was any thing left, it was to be applied in equal proportions and without preference, towards the payment of all other partnership debts. The assignment of the individual property of the assignors contained similar provisions. *Held* that the assignments must be construed in connection with the agreement of November 16th, and the three together must be looked upon as constituting one transaction or instrument; and that, thus viewed, the assignments were on their face fraudulent and void as to the plaintiff and other creditors who were not preferred, and who declined signing the agreement: 1st. Because the assignors thereby intended to reserve or secure for themselves a benefit; and 2d. Because the whole proceeding was an attempt to coerce the creditors to enter into the compromise.

ACTION to set aside assignments made for the benefit of creditors.

SUTHERLAND, J. I think the assignments made, or purporting to have been made, for the benefit of their creditors, by Bradner & Furman, on the 1st day of December, 1854, must be construed in connection with the previous agreement of the 16th November, between them and certain of their creditors, and that in deciding the question whether the assignments were and are fraudulent and void as to the plaintiff on their face, the agreement and the assignments must be looked upon as constituting one transaction or instrument. The assignment of the partnership property contains a recital in these words: "Whereas the said parties of the first part are co-partners in trade in the city of New York, under the firm of Bradner & Furman, and are at present unable to pay their debts, *and have agreed* to assign the property hereinafter referred to for the benefit of their creditors, *in the manner hereinafter mentioned.*"

The complainant alleges that the assignment which Bradner & Furman respectively made of their individual prop-

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erty, contained similar provisions to those contained in the assignment of their partnership property, and was made for a like purpose and pursuant to the agreement of the 16th of November previous. This allegation is not denied by the answer of the defendants, but is substantially admitted by it.

By the agreement of the 16th of November, the creditors who executed it covenanted to and with Bradner & Furman, that in case they should, on or before the 1st day of December, 1854, execute to Peter O. Strang an assignment of all their property, preferring in said assignment as first class creditors an amount not exceeding \$60,000, and preferring them (the creditors who executed the agreement) to the amount of fifty cents on the dollar on their several claims, they would in such case on the execution and delivery of such assignment discharge them, the said Bradner & Furman, from all liability for the balance of their claims.

The assignments were made to Peter O. Strang on the 1st day of December, 1854. By the assignment of the partnership property, certain creditors, representing about \$53,000 of the debts, were first to be paid in full; the sixty creditors who signed the agreement of the 16th of November, representing about \$93,000 of the debts, were next to be paid 50 per cent; and then, if there was any thing left, it was to be applied in equal proportions and without preference, towards the payment of all other partnership debts.

It is apparent that the assignments were in fact made in pursuance of the agreement of the 16th of November, and that they should be construed together, and should be looked upon as constituting one instrument, for the purpose of seeing whether the law, on the face of the instruments themselves, pronounces the transaction illegal, and fraudulent and void, as to the plaintiff and other creditors, who were not preferred, and who declined signing the agreement of the 16th of November.

Strang, the assignee, has realized from the assigned property \$72,37.782, and that is all that probably ever will be

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realized. The preferred debts of the first class, amounting with interest thereon to \$61,072.42, have been paid by the assignee. The rest of the property and of its proceeds are in the hands of the assignee. The effect of the transaction, if carried out, would be wholly to deprive the plaintiff and other creditors, who did not sign the agreement, and who were put in the third class, wholly, of any share or portion of the assigned property, or of its proceeds.

By the agreement of the 16th November, the creditors who signed it in the first place severally covenanted to and with Bradner & Furman, *in consideration of one dollar to each of them paid by Bradner & Furman*, that they would discharge their debts on receiving, on or before the 1st day of December, 1854, forty cents on the dollar in securities, and the notes of Bradner & Furman for ten cents on the dollar. The creditors then further covenant, "in case the said Bradner & Furman shall be unable to do so," (that is, effect the compromise,) upon the execution of the assignment to Strang, putting them in the second class for fifty per cent of their debts, to release the balance as above more at large substantially set forth.

The acceptance of the agreement by Bradner & Furman, although it does not appear to have been signed by them, was in effect a promise or covenant on their part, in case they made an assignment, to make it to Strang, and to put the creditors who had signed it in the second class, and to prefer them over, those in the third class, to the amount of fifty cents on the dollar. It is apparent from the papers, and from the whole transaction, that the consideration which induced this preference, was not any supposed equitable nature of the claims of these creditors, or any sense of a moral or honorable obligation, but was the covenant on the part of these creditors to release the balance of their claims. By this transaction these creditors purchased, and Bradner & Furman sold to them, their position in the assignment, and the chance of getting fifty per cent, or at least something on

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their debts. Surely, the absolute release of their future acquisitions from nearly fifty thousand dollars debt was an important consideration for the assignors. Surely, if by this arrangement, or transaction, the assignors secured or reserved to themselves the absolute right to this release, they secured or reserved an important benefit for themselves.

The manifest intent of Bradner & Furman was to coerce all of their creditors into the terms of the compromise provided for in the agreement of the 16th November. It would appear from the instrument itself, and I think it appears from the pleadings and the evidence in this case outside of the instrument, that the compromise was first offered to the creditors, and not proposed by them.

The agreement purports to have been executed in consideration of one dollar paid by Bradner & Furman. By presenting this instrument to the creditor, Bradner & Furman in effect said to him, sign this, and you will get half your debt; but if you do not sign it, you will of course fall into the third class and get nothing. It is plain to me, from the transaction as shown by the papers, that Bradner & Furman wished to avoid making an assignment by making the proposed compromise with all their creditors. Not being able to get all, except those whom they intended to pay in full, to sign it, they made the assignment.

It appears from evidence in this case that, notwithstanding the assignment, the assignee has never paid any thing to the second class creditors, and that most if not all of their claims, after the assignment, were purchased by friends or relatives of the assignors, or of one of them, at rates from ten to fifty cents on the dollar.

My conclusion is, that the assignment to Strang, when viewed in connection with the previous agreement of the 16th of November, on its face is fraudulent and void as to the plaintiff, and must be declared to be so, upon two grounds: 1st. Upon the ground that the assignors thereby intended to reserve or secure for themselves a benefit; 2d. Upon the

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ground that the whole proceeding, viewed as one transaction, was an attempt to coerce the creditors to enter into the compromise. I think this case comes fairly within the principle decided in *Hyslop v. Clarke*, (14 John. 458;) *Wakeman v. Grover*, (4 Paige, 23, S. C. 11 Wend. 187;) *Armstrong v. Byrne*, (1 Edw. Ch. 79;) *Lentilhon v. Moffatt*, (1 id. 451;) *Mills v. Levy*, (2 id. 183.)

An insolvent has a right to make an assignment for the benefit of his creditors, with preferences. In this case, Bradner & Furman had a right to prefer the second class creditors to the third, but they had no right to enter into a *bargain* with the second class to give them such preference, and carry it out under color of an assignment for the benefit of their creditors, for their own benefit, to the injury of the plaintiff and other creditors not parties to the *bargain*.

The plaintiff is entitled to a judgment declaring the assignment and the whole transaction void as to him and other creditors who were not preferred and did not sign the agreement of the 16th of November, and that he is entitled to be paid the amount of his judgment, with interest thereon and the costs of this action, out of the assigned property, or the proceeds thereof remaining in the hands of the assignee, after the payment of the first class creditors in full, at the time of the commencement of this action.

It appearing by the answer of the defendants that there remained in the hands of the assignee, after having paid the creditors of the first class, in full of the proceeds of the assigned property, more than sufficient to pay the plaintiff's claim with costs, my impression is, that the assignee should be directed to pay the same out of such funds, without any reference to taking an account of the assigned property and the proceeds thereof. This question and all other questions is reserved, however, until the settlement of the decree, which must be settled on two days' notice. As this action is for the benefit of the plaintiff alone as a judgment and execution creditor, and not for the benefit of himself and other credi-

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tors in the like situation, if the assignee has sufficient of the trust funds in his hands to pay the plaintiffs claim after having paid the first class creditors in full, I see no necessity either for a receiver or for a reference to take an account.

[NEW YORK SPECIAL TERM, July 31, 1900. *Sutherland*, Justice.]

WINSLOW vs. McCALL and CARLEY.

32 241
61h 437
32b 241
66 AD*491

The assignee of a junior mortgage, whose assignment is recorded, is entitled to notice, upon the foreclosure by advertisement of a senior mortgage.

If no notice is served upon him he will not be foreclosed; nor will his rights under his mortgage be affected by the foreclosure and sale.

Where the owner of premises which are subject to a mortgage, while in possession thereof, takes an assignment of the mortgage, which is subsequently forfeited by the non-payment of the amount due thereon, he will, from the time of such forfeiture, be deemed a mortgagee in possession, and may defend the possession until his debt is paid.

It is not necessary that he should have obtained possession as mortgagee, either by consent of the mortgagor, or by legal proceedings. It is sufficient if he obtained the possession in some legal mode.

A grantee will not be prejudiced in his claim under a covenant of warranty, by a failure to take the actual possession of the premises immediately. He has the right to leave them vacant, if he chooses; and the fact that he might, by taking immediate possession, have prevented a mortgagee from becoming mortgagee in possession until the grantee should resort to legal proceedings, will not affect the right of the latter under the covenant.

If the right of a mortgagee in possession exists at the time of the conveyance of the premises to a purchaser, in fee, and such mortgagee can, by virtue of that right, now resist the claim of the grantee to the possession, and does in fact resist such claim, the covenant of warranty is broken, and an action can be maintained thereon.

A subsequent incumbrancer has no claim upon the surplus moneys arising from a sale under a statute foreclosure of which he has no notice; his lien not being affected by the proceedings. The land, therefore, will not be discharged from the lien of his incumbrance and transferred to such surplus moneys.

Where the plaintiff purchased of the defendants a piece of land for \$1400, paying \$500 down, and giving her bond and mortgage for \$900; *Held*, in an action for breach of the covenant of warranty and quiet enjoyment con-

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tained in the deed, by reason of the existence of a prior mortgage upon the premises, under which the mortgagee was in possession, that the measure of damages was the amount due upon the mortgage last mentioned, with interest from the commencement of the suit.

ON the 26th day of February, 1859, the defendants conveyed to the plaintiff about seventy acres of land, part of lot No. 62, in the town of Marathon, in the county of Cortland. The consideration for the sale was \$1400. Of this the plaintiff paid down \$400 in money, and delivered to the defendants the note of her husband for \$100, and the balance was secured by her bond and mortgage on the premises for \$900, payable in installments. The deed contained the usual covenants for quiet enjoyment and warranty. At the time this conveyance was made, one Hervey J. Pike was in possession of the premises as a tenant under *Richard D. Cornwell*. His possession *as such tenant* commenced on the 14th day of May, 1857, and has continued since that time. Cornwell derived title to the premises on the 16th day of February, 1857, by conveyance from Jacob L. Talbut, whose title by several mesne conveyances came from *John Hough-tailing*. In addition to this, Cornwell, on the 9th day of March, 1859, became the assignee of a mortgage on the premises, and which was a valid lien thereon, for the sum of one hundred dollars then remaining due, and the interest thereon from the first day of April, 1858. This mortgage was given by Philip Heartt, jun., (a former owner of the premises) to Henry W. Burlingame, on the 21st day of March, 1853, to secure the payment of \$500, and was recorded on the 21st day of April, 1853, in Cortland county. On the 11th day of April, 1854, Burlingame assigned this mortgage to Hiram W. Betts, and on the same day this assignment was recorded in the clerk's office of the same county. On the 9th day of March, 1859, Betts assigned the mortgage to Richard D. Cornwell, and the assignment was duly recorded on the 11th day of March, 1859. The defendants de-

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rived their title to the premises through the foreclosure of a mortgage thereon, executed by Asahel R. Cannon and Bathsheba his wife, to John Houghtailing, dated the 29th day of March, 1849, and given to secure the payment of \$1000, and duly recorded on the 11th day of December, 1849. On the 8th day of August, 1854, John D. Cannon became the owner of this mortgage. On the 15th day of July, 1858, he commenced proceedings to foreclose this mortgage, by advertisement, under the statute. The sale took place on the 12th day of October, 1858, and the premises were bid off by Hiram McCall, one of the defendants. No notice of this foreclosure was served on Hiram W. Betts, or on Hervey J. Pike, or on the personal representatives of Bathsheba Cannon. About the first of April, 1859, Winslow, the husband of the plaintiff, demanded possession of the premises of the defendants. On the 6th day of April, 1859, a written request from the plaintiff was made of the person in possession (Hervey J. Pike) that he remove therefrom; and likewise demanding possession thereof, by virtue of the conveyance to her. Pike refused to leave the premises, on the ground that he was in possession, as a tenant under Richard D. Cornwell. Pike as such tenant still keeps the plaintiff out of possession.

This action was brought by the plaintiff, against the defendants, upon the covenant of warranty and quiet enjoyment contained in their deed of February 26, 1859. The plaintiff claimed to recover the sum of \$500, being the amount of purchase money paid by her at the time of the purchase, with interest.

H. Ballard, for the plaintiff.

McDowell, Stilson & Edwards, for the defendants.

PARKER, J. The principal question in this case is whether the foreclosure of the mortgage by Cannon barred the assignee of the Heartt mortgage, and this I find a difficult

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question. It was decided by Justice Hand, at special term, in *Wetmore v. Roberts*, (10 How. Pr. B. 51,) that an assignee of a junior mortgage, whose assignment was recorded, was entitled to notice, upon the foreclosure by advertisement of a senior mortgage. That is this case; and inasmuch as, aside from authority, the question is one of much doubt, I feel bound by that decision, not finding any which conflicts with it.

If then Betts, who was an assignee of the Heartt mortgage, was entitled to notice on the foreclosure of the Cannon mortgage, no notice having been served on him, he was not foreclosed, and his rights under his mortgage were not affected by the foreclosure and sale. He stood after the foreclosure precisely as though none had been made.

At the time of the foreclosure and sale, Pike was in possession; and was in, as I think, as the tenant of Cornwell. He entered under the lease from Cornwell, the term in which continued until the 1st of April, 1858. Cornwell was then the owner of the premises, subject to the mortgages, and so continued until the sale under the foreclosure proceedings, on the 12th day of October, 1858, to the defendant McCall. Now although a memorandum was subjoined to the lease on the 10th day of March, 1858, signed and sealed by R. D. and W. P. Randall, and the lessee Pike, as follows: "We, the undersigned, hereby mutually agree that the above lease may stand for one year from the first day of April next, and that for value received, we promise and agree, each to the other, to be governed in all respects by said lease for the term above specified;" still there is nothing to show that the Randalls had or claimed any interest in the premises, and no such interest or claim can be inferred from the terms of the memorandum, but the inference rather is, that they stipulated on behalf of Cornwell, as his sureties, or possibly as his agents. The agreement is, that *the lease* shall stand for another year. Pike does not agree to pay any rent to the Randalls, but to Cornwell. The next succeeding year a similar extension is

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signed by Cornwell himself. Pike, moreover, testifies that he has continued in possession ever since he first entered as tenant to Cornwell. I therefore hold that Pike, at the time of the foreclosure and sale, and at the time of the conveyance by the defendants to the plaintiff, and ever since, was and has been Cornwell's tenant. Cornwell has never been divested of the possession of the premises since his first entry under his deed from Talbut. Cornwell's interest in the premises, however, was subject to the Cannon mortgage; and on the foreclosure of that mortgage he was served with notice, and his equity of redemption was foreclosed against, and his interest divested. The possession which he thenceforth retained through Pike, his tenant, was not adverse as against the defendants, or the plaintiff, claiming under the Cannon mortgage, until he became the assignee of the Heartt mortgage. Pike's possession, therefore, was not adverse at the time the defendants conveyed to the plaintiff. The defendants' counsel insist that, inasmuch as the plaintiff, in her complaint, alleges that Pike was in possession under Cornwell, who was the owner of the premises and claimed title thereto, adversely to the defendants, at the time the defendants executed the deed to the plaintiff, she cannot gainsay the fact. But the defendants deny that fact, distinctly, as the plaintiff alleges it; and an issue being made upon it, neither party can rest upon the allegation of the other, but the issue must be decided according to the facts appearing in the case.

On the 9th of March, 1859, Cornwell became the owner of the Heartt mortgage, with all the rights of Betts under it. On the 1st of April, 1859, that mortgage became forfeited by the non-payment of the amount remaining unpaid and which then became due, to wit, \$100 and interest thereon from 1st April, 1858. Cornwell was then in possession—a possession legally acquired, and of which he had never been divested. I think he is from that time to be deemed a mortgagee in possession. It is not necessary that he should have obtained possession, as mortgagee, either by consent of the

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mortgagor, or by legal proceedings. It is sufficient if he obtained the possession in some legal mode. After forfeiture, he is considered as having the legal estate, and being legally in possession, may defend until his debt is paid. (15 *Wend.* 248.) Cornwell, then, as against the plaintiff, has a right of possession, paramount to her's. It matters not that the paramount right, in the condition in which it now exists, did not accrue until after the execution of the conveyance by the defendants to the plaintiff. She cannot be prejudiced, in her claim under the covenant of warranty entered into by the defendants with her, by not having immediately taken the actual possession of the premises. She had the undoubted right to leave them vacant if she chose; and the fact that she might, by taking immediate possession, have prevented this mortgagee from becoming mortgagee in possession, until he should resort to legal proceedings, does not affect her right under the covenant. That would only have driven him to redeem the premises from the sale under the foreclosure proceedings, and thus to have ousted her of the possession. His right against that conveyed to her, existed in the hands of Betts at the time of the conveyance to her; and if he can, by virtue of that right, now resist her claim to the possession, and does in fact so resist, the covenant of warranty is broken, and this action can be maintained. (6 *Barb.* 172.)

It is contended by the defendants' counsel that the lien of the Heartt mortgage is transferred from the premises to the surplus remaining in the hands of Cannon, from the foreclosure and sale under the mortgage held by him, and such surplus being sufficient to satisfy the Heartt mortgage, that Cornwell has no right to the possession of the premises under that mortgage.

The case of *Slee v. Manhattan Company*, (1 *Paige*, 48,) cited to sustain that position, does not, I think, sustain it. There, Slee owed the Manhattan Company \$2000; and, holding a mortgage against Frear & Hallowell for \$4000, he assigned it to the company as collateral security for the pay-

ment of the \$2000. The company foreclosed the mortgage, and bid in the premises for \$700. And all that was held in that case upon the point now in question was, that the assignment authorized the assignee to foreclose the mortgage assigned; that if a stranger had purchased under the foreclosure, he would have taken a good title against the mortgagee who had assigned; that the foreclosure of the mortgage did not affect the right of the mortgagee in that mortgage, who had assigned it, to redeem his mortgage, his assignment being in the nature of a mortgage; but that his equity of redemption would, after the foreclosure of the mortgage so assigned, and a purchase of the premises by a stranger, attach itself to the money for which the land was sold, instead of the land itself. It was held in *Waller v. Harris*, (7 Paige, 167,) that a subsequent incumbrancer has no claim to the surplus produced by a sale in a statute foreclosure, as his lien is not affected by the proceeding. The latter case, and not the former, states the rule applicable to the case under consideration.

Upon the whole case, I do not see why the plaintiff is not entitled to recover.

In regard to the damages, no question was made, on the trial, nor in the briefs submitted, as to the rule. The plaintiff claims to recover back the \$500 of the purchase money paid by her at the time of the conveyance, but makes no claim in regard to the \$900 bond and mortgage which she at the same time executed to the defendants. On what principle she assumes \$500, as the measure of damages, I do not quite understand. The title which she has obtained by the conveyance to her, is good against all the world, except this mortgagee in possession, and he is entitled to hold possession only until his debt shall be paid, by the rents and profits of the premises, or otherwise. When the debt is paid in that way or any other, the obstruction to her possession ceases, and her title is complete and unincumbered, except by the mortgage which she, herself, gave to the defendants. If the

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entire title had failed, or if the amount due on the mortgage equalled the value of the land, then the purchase money and interest would have been the measure; and the \$1400 would have been recoverable, less the \$900, indeed, if the claim to such deduction were properly set up in the answer. But here the title has not failed absolutely; nor is the amount of the mortgage equal to the value of the land, evidenced by the consideration in the deed.

In *White v. Whitney*, (3 Metc. R. 81,) it was held that when land, that is subject to a mortgage, is conveyed with a covenant of warranty, and the grantee is ousted by the mortgagee, the rule of damages upon a suit on the covenant, is the value of the estate at the time of the ouster, unless that value exceeds the amount due on the mortgage; but if it exceed that amount, then that amount is the measure of damages. Chief Justice Shaw says, in giving the opinion of the court in that case, "If the right of redemption is not foreclosed, and the land may be redeemed for less than its value, the amount to be paid for such redemption—the amount due on the mortgage—will be the measure of damages, because it will afford the plaintiff complete indemnity. Cases may be supposed where the outstanding mortgage, though assuming the form of a paramount title, which, if not redeemed, would take the whole estate, and evict the covenantor; yet, being very small in amount in comparison with the value of the estate, it would be plainly for the interest of the owner and holder of the equity of redemption to redeem. In such a case it would be quite unreasonable to hold that the covenantee, on such an eviction, should recover damages to the full value of the estate." In *Donahoe v. Emery*, (9 Metc. R. 63,) it was held that when a grantee, who is evicted by the holder of a mortgage, made prior to his grant, sues his grantor on his covenant for quiet enjoyment, he is not entitled to recover damages beyond the amount of the mortgage debt, if the mortgage be not foreclosed.

Justice Wilde says, "The rule laid down was adopted in

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Tufts v. Adams, (8 *Pick.* 550,) and confirmed in *White v. Whitney*, (3 *Metc.* 81,) and it seems founded on a principle of reciprocal justice. The plaintiff is entitled to indemnity, no more, and to compel the defendants to pay the full value of the estate, would be unjust if it exceeded the amount of incumbrance." The same principle has been held in this state. In *Guthrie v. Kingsley*, (12 *John.* 126,) the defendants had conveyed in fee, to the plaintiff, with covenant of seisin; they, in fact, had only a life estate in four-sixths of the premises, and an estate in fee in two-sixths, and no more passed to the plaintiff by their conveyance. In an action on the covenant it was held, that as to two-sixths there was no failure of title, but as to the residue, as the conveyance carried to the plaintiff a life estate, his damages were four-sixths of the consideration money, deducting therefrom the value of the life estate. The principle is recognized also in *Wager v. Schuyler*, (1 *Wend.* 553,) and in *Rickert v. Snyder*, (9 *id.* 423.) In the latter case, the plaintiff, to whom the defendant had conveyed in fee, with covenant of warranty, was ousted from the possession by the holder of a term for years, and in an action on the covenant was allowed, at the circuit, to recover the whole value of the land, with interest. The court, on a motion for a new trial, say: "The plaintiff was permitted to recover the whole value of the land. This was wrong. The record did not show that Kline was seised of the premises, which he recovered, but on the contrary, that he was *possessed* of a term. The extent of that term, and the annual value, or the interest of the purchase money, should have been the measure of damages." According to the principle of the cases above cited, the plaintiff is entitled to recover such sum as will afford her a complete indemnity, for the breach of the covenant, and that is held to be the amount due on the mortgage, which, at the commencement of this suit, was \$107.29. That amount she was then entitled to from the defendants, and she is now entitled to interest on that sum from the commencement of the suit to the date of

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the referee's report; the sum which she is entitled to recover being, in the aggregate, \$117.63. This fully indemnifies the plaintiff for the breach of the covenants; for Cornwell, the mortgagee in possession, is to account to her for the rents and profits of the premises, and these, as between them, go to satisfy, or lessen the amount due on the mortgage, to the extent of their value.

As no question was made by the defendants, on the trial, in regard to the amount claimed by the plaintiff, so that they might, perhaps, be deemed to assent to her right to recover that amount, if entitled to recover at all, I should not have started that question, did I not find myself confronted with it, and were it not one, a wrong decision of which would be cause for a reversal of the judgment, as it would be entirely competent for the defendants to except to the report of the referee for any error in the rule of damages adopted in it. I am, therefore, compelled to meet and decide the question, and both from the principle and authority, to hold the rule above stated.

[CORTLAND SPECIAL TERM, JANUARY 9, 1860. *Parker*, Justice.]

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At common law, a deed of lands, from a married woman to her husband, is void, and passes no title; and the act of April 11th, 1849, "for the more effectual protection of the rights of married women," does not remove the common law disability of the wife, so far as to authorize her to convey her lands directly to her husband. CAMPBELL, J. dissented.

THIS was an action for breach of a covenant contained in a deed; and was submitted to the court upon a statement of facts agreed upon by the parties.

M. Lyon, for the plaintiff.

T. O. Love, for the defendants.

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MASON, J. At common law a deed of lands from the wife to her husband is void, and passes no title. (2 *Kent's Com.* 129. *Martin v. Martin*, 1 *Greenl. R.* 394. 3 *E.* 63.) The only question presented for our adjudication in this case is whether the act of April 11, 1849, removes the disability of coverture under which the wife labors at common law, so far as to authorize her to convey her lands directly to her husband. This statute declares that any married female may take by inheritance, or by gift, grant, or devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with like effect as if she were unmarried. (*Laws* 1849, p. 528, sec. 3.) This statute in general terms declares that she may convey and devise real and personal property in the same manner and with the like effect as if she were unmarried. The defendant's counsel claims and insists that this statute authorizes her to convey her real estate directly to her husband. I do not think it does. It is a familiar principle that statutes are to be construed in reference to the principles of the common law, for it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely requires. (1 *Kent's Com.* 463, 3d ed.) This has been the language of the courts in every age. It is said, also, that four things are to be considered in the interpretation of all statutes: 1st. What was the common law before the act? 2d. What was the mischief against which the common law did not provide? 3d. What remedy has the legislature provided to cure the defect? and 4th. What was the true reason of that remedy? The common law, before the passage of this act, held a married woman disqualified to take and hold real and personal property to her sole and separate use independent of her husband. The personal property which she received by inheritance, gift or bequest, became absolutely her husband's,

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and her husband, *jure uxoris*, was entitled to take the rents and profits of her lands, and he was *jure uxoris* seised of a freehold estate therein during their joint lives. The wife was excepted from the statute of wills, and she could neither devise her real estate, nor bequeath her personal property, and she was incapable of conveying her real estate unless her husband joined with her. These were great disabilities under which the married woman labored, and they were by the legislature regarded as evils entailed upon her by the common law, which ought to be removed; and to remove these general disabilities, this statute was passed by which she is capacitated, as we have seen, to take and hold to her sole and separate use both real and personal property the same as if she were unmarried, and by which capacity is given to her, in general terms, to convey and devise the same in the same manner and with the like effect as if she were unmarried. This general incapacity to take and hold to her sole and separate use, and this general incapacity to convey her real estate by grant and devise, were the mischiefs against which the common law did not provide, but which it upheld; and the evils which the legislature set about curing were these defects in the common law as they regarded them. The true reason of this remedy is well expressed in the title of the act, which declares the act to be "an act for the more effectual protection of the property of married women." There were certain other disabilities at common law under which both husband and wife labored at the time of the passage of this act, and which I have no idea the legislature intended to interfere with. They were so far regarded as one, in the law, that they were incapable of making any valid contract between them. This was so truly the case that a deed of lands from either one to the other was at common law absolutely void and passed no title. This disability of husband and wife was not the mischief which the framers of this statute intended to provide against, and this statute does not in the least remove this marital disability. The statute has in ex-

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press terms preserved it on the part of the husband, by declaring that the wife may take and hold from any person other than her husband, and it would be extraordinary to preserve the disability in one party and remove it from the other; and especially so in a statute like this, which was enacted for the protection of the property of married women, to declare in effect that the husband cannot make a conveyance of his property to his wife, but that the wife may convey hers to him. I fear, if this is the construction to be put upon the act, it will utterly fail to accomplish the purposes intended by its framers. The husband will be pretty likely to get the wife's property, but the wife will get none of his. There certainly is no propriety in giving such a construction to the act; and it is a familiar rule in the construction of statutes that where the intent is doubtful, the consequences resulting from a particular construction are to be regarded. (*Smith on Statutes*, p. 693, § 548.) The English rule of construction is sound, which declares that the intent and meaning of the legislature must be found partly from the words of the statute, and partly from the mischief which the statute was intended to remedy. (*Smith on Stat. Construction*, p. 821, § 703.) That intent sometimes becomes so controlling that it is found necessary to expound it against the letter, in order to preserve the intent of the statute; for a thing which is in the letter is not within the statute, unless it be within the intention of the makers. (*Smith on Stat. Con.* 820, § 701. *Bacon's Abr. stat. II.* 15 *John.* 380. 5 *id.* 449. 2 *Burr. R.* 786. 3 *B. & A.* 266, 212. *Plowden*, 18. 4 *Gill & John.* 6.) The rule consequently is, that when a case arises which it is clear is out of the mischief intended to be guarded against, the letter of the statute will not be deemed the intention of the lawgiver, but the spirit of the statute will control the letter. (*Fars v. Marteller*, 2 *Cranch's R.* 10.) If, therefore, the letter of this statute is broad enough to remove all these common law disabilities from the wife, so as to authorize her to convey her

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lands directly to her husband, it must not be so construed, for the reason that such a construction is not within the spirit of the act—is not within the mischief to be guarded against. The principle precisely applicable to the case at bar is well stated by the court in *Lessees of Brewer v. Blougher*, (14 *Peters' R.* 178,) where the court says, it is undoubtedly true it is the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject matter to which it relates, and restrain its operations within narrower limits than its words import, if the court are satisfied that the literal meaning of its words would extend it to cases which the legislature never designed to include in it. (*Smith on Stat. p.* 822, § 904.) This principle controls the case at bar, even if the letter of the statute should be held to include the case under consideration; and besides, as we have already seen, in a statute it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. (1 *Kent's Com.* 463, 3d ed.) Now I take it to be very clear that the mischief which this statute was intended to guard against did not require that the legislature should authorize the wife to convey her lands directly to her husband. The very contrary is the case, as we have seen already, for the statute was enacted, as its title declares, for the more effectual protection of the property of married women; and such an authority, conferred upon her, instead of being one of protection to her, would be the very reverse of it. It is in the very nature of this relation of husband and wife that the husband should acquire an almost unlimited control over the wife. It is for this reason that our statutes have declared that when the wife joins with her husband in the conveyance of her right of dower in his lands, she shall be examined before a commissioner, separate and apart from her husband, and state that she executes the same freely and without any fear or compulsion of her husband. This influence and control of the husband over the wife is regarded as so supreme, at common

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law, that she is acquitted from most criminal offenses committed by her in the presence of her husband, upon the presumption which the common law indulges, that she acted under the coercion of her husband. (1 *Mass. R.* 476, 391. 10 *id.* 152. 2 *Stark. Ev.* 399.) It is in the very nature of this relation that the wife should be confiding in her husband and solicitous to meet the desires, wishes and expectations of the husband; and both parties soon become unhappy in this relation when such is not the case. The present generation have so long been schooled and educated in the principles of the common law, in which the wife's legal capacity to hold property, make contracts and transact business has been wholly unrecognized, that the opinion is very prevalent with heads of families that the wife is rightly placed in such relation of incapacity; and the husband therefore will be very likely to think that it is right and proper that his wife should make over the property to him, for he can manage and control it better than the wife. And I think that I do not state the case too strongly when I assert that the husband does and will have a controlling influence over the wife in these respects. Acting upon the belief that this act, which deprives the husband of all these important rights of property which the common law has heretofore recognized as belonging to him, is unwise if not wrong, he will seek the control of the property through the consent of the wife, and the consequence will be, in very many cases, he will be very sure to acquire it, and, if he does not, the wife will be subjected to very disagreeable importunities; and if she stands out and refuses, she will be very likely to incur the displeasure of her lord, and the matter will many times, I have no doubt, end in bickerings destructive to the peace and happiness of families. I can hardly think the legislature intended to make so unwise an enactment in a statute passed for the professed object of more effectually protecting the property of married women. If this statute is to be so construed, the title of the act ought

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to be changed ; for the act itself would be destructive of the object declared in the title. I am of opinion, for the reasons stated, that no such construction reasonably can, or should, be put upon this act. But I maintain, in the next place, that the words of the act itself do not remove the common law disability of the wife to convey her lands to her husband. All the statutes declare is, that she may "convey in the same manner and with the like effect as if she were unmarried." She may convey in the same manner ; that is, she may convey by deed under seal, and her acknowledgment of the conveyance may be the same as a single woman's. She may convey with a like effect ; that is, the same effect shall be given to her conveyance made and executed in the same manner, that is given to the deed of a single woman. I see nothing of intention in all this to authorize her to convey to her husband ; nothing to remove the common law disabilities which exist between them to contract with each other. She may convey in the same manner and with the like effect as a single woman. The statute only speaks of the manner and effect of her conveyance, but is not declarative of the cases in which, or the class of persons to whom, she may convey ; and when the legislature knew that she was utterly disqualified to make any contract with her husband, or any conveyance to him, if they had intended to remove this disability and authorize her to do so, they would have expressed their intent in plainer language than this. I insist that in declaring that she may convey in the same manner and with the like effect as a single woman, there is no intent expressed, from the plain meaning of the words, to authorize her to convey to her husband. The case of husband and wife is not embraced in the language or words of the sentence. The effect and manner of a single woman's deed to her husband has never yet been considered in the law, and never will be, for the case can never arise. I am entirely satisfied that this deed from the wife to her husband is absolutely void at common law and under this statute, and passed no title, and

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consequently that the plaintiff is entitled to recover the consideration expressed in the deed for this breach of covenant. The covenant of seisin was broken on the delivery of the deed, and the plaintiff is entitled to recover the consideration paid, with interest. The defendant's counsel claims and insists that if this deed is void at common law, it is the duty of this court to uphold it in equity. This cannot be done. There is no principle of equity upon which such a deed can be upheld and made better in equity than it is at law. Equity never makes a purely voluntary deed without consideration better than it is at law. (*Fonbl. Eq.*, Book 1, ch. 5, § 2. 1 *Vernon*, 429. 1 *Chan. R.* 84. 3 *Brown's R.* 13. 2 *Ves.* 271. 1 *John. Ch. R.* 336. 1 *Story's Eq.* § 196. 4 *Ves.* 802. 2 *Dessauss.* 191.) Equity will only interfere to make a conveyance good which is not good at common law, when the conveyance is based upon a consideration. (*See cases above*; 7 *John. Ch. R.* 57.) There must be judgment for the plaintiff, for the consideration expressed in the deed, and interest, with costs, to be taxed.

BALCOM, J. concurred.

CAMPBELL, J., (dissenting.) The only question presented in this case is whether a married woman can convey her real estate directly to her husband. The wife of the defendant "not being indebted to any person, without being influenced by the said defendant, but in good faith and without fraud, freely and voluntarily, as her own act and deed, with intent to and for the purpose of giving the said land to the defendant, and of vesting the title to the same in him, in view and in the prospect of immediate death to her known, and being of sound mind and understanding, did sign, seal, acknowledge, execute and deliver, in due form of law, to the defendant, her husband, a quitclaim deed, conveying to the defendant, in his actual possession then being, the said land &c., and on the next day thereafter departed this life, leaving the

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said deed in full force and effect, and also leaving her surviving two infant children."

Upon the foregoing agreed state of facts the plaintiff claims that the deed is utterly void and of no effect, while the defendant insists that "the deed from his wife is a good deed of gift *mortis causa*, both at law and equity." The deed was executed the 15th of August, 1849; and as to part of the land, the wife became the owner by inheritance from her mother, after the passage of the act of 1848, and the balance having been inherited from her father several years previous.

"By marriage, the husband and wife are one person in law, (1 *Inst.* 112;) that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of her husband, under whose wing, protection and cover, she performs every thing, and is therefore called in our law French, a 'femme covert.'" (*Jacob's Law Dict. Baron and Feme.*) Such was the strict rule of the common law, and upon that principle of union of persons in husband and wife have depended almost all the legal rights, duties and disabilities which either of them acquire by or during the marriage.

For this reason, a man cannot grant any thing to his wife, or enter into a covenant with her; for the grant would be to suppose her to possess a distinct and separate existence. (*Story's Equity*, § 1367.) Under the Roman law, marriage was said to be *conjunctio maris et foeminae; consortium omnis vite divini et humani juris communicatio*—that joining together of the male and female, the fellowship of a whole life and the union of both the divine and human law. Yet, under the Roman civil law, more liberal rules prevailed in relation to a married woman's rights of property; and following these rules, courts of equity, at an early day, began the introduction of a more liberal system to meet the wants and necessities of a higher and perhaps a better civilization, and which were not provided for under the stern and unbending rules of the English common law. "Courts of equity,

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for many purposes, treat the husband and wife as the civil law treats them, as distinct persons capable, in a limited sense, of contracting with each other, of suing each other, and of having separate estates, debts and interests. (*Story's Eq.* § 1368.) But to protect the property of the wife from the operation of the rules of the common law, the intervention of trustees became necessary; and complicated forms of conveyances, uses, trusts, powers and appointments, followed in the train. Our recent statutes, while embodying many of the principles and rules of the courts of equity, have swept away the cumbrous appendages, and declared that a married woman may hold in her own name, to her own use, her separate estate, both real and personal, not subject to the disposal of her husband, and not liable for his debts; and may convey and devise the same in the same manner and with like effect as if she were unmarried.

It would seem as if nothing more was necessary. But while it is admitted that she has almost unlimited power of disposing of her estate, it is said that the husband cannot be the donee or grantee, because he and the wife are but one person in the law, and a conveyance to him would therefore be but a conveyance to herself, which it is manifestly impossible for her to make. And yet at all times, or for many years, in this state, and long prior to the acts of 1848 and 1849, a wife could unite with her husband in a deed of her real estate to a third party, and that third party reconvey to the husband, thus vesting complete title in him; and such a conveyance, in cases free from fraud or undue influence, would be upheld. A wife could give her property to her husband, as was held in *Jaques v. The Methodist Church*, (17 John. 548.) And it was held in other cases, that when there were settlements, and the power of appointment was given to the wife by deed, she might make her husband the appointee, in cases likewise free from fraud. It would seem, therefore, that it was worse than useless to hold that the wife may not do directly that which it is clear she may do indi-

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rectly. The maxim of the common law, that the husband and wife are but one person in the law, so far as the wife's separate estate is concerned, is no longer applicable, and is a mere legal fiction. It is still however, in many respects, applicable and in force. Few in our land, of right thinking persons, would be willing to see the rules of the common law, which regulate the domestic relations, materially altered. The husband is still the head of the family and master of the household; within his domains he is king, and if he rules rather by the *potior affectio* than by the *potior vis*, so much the better. As representative, he unites for many purposes the interests of both himself and his wife. I have not overlooked the provisions of the act of 1849, that any married female may take by inheritance or by gift, grant, devise or bequest, from any person other than her husband. She could always take from him, before these statutes, by devise and bequest directly, and indirectly by gift or grant. She may do so now, but the property so obtained by gift or grant indirectly she may not hold and enjoy and convey to the full extent provided for in these statutes. It may well be that the legislature thought it not prudent to afford additional facilities for the husband to vest his estate in the wife, who could not make binding contracts except as they were charges upon her estate. But however this may be, it does not necessarily restrict the right of the wife to convey to her husband her own separate estate. The gift in this case can hardly be called, as claimed by the defendant's counsel, a *donatio causa mortis*. Such gifts have reference solely to personal property, such as the dying person may deliver or cause to be delivered. It has been held to include bonds and other securities payable to the giver; and in *Wright v. Wright*, (1 *Cowen*, 598,) a promissory note, executed by the dying man and given to his brother, was held a charge against the estate.

The definition given in *Prince v. Hasleton* by the chancellor, in his opinion, (20 *John*. 514,) was this: "A *donatio*

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causa mortis is where a man lies in extremity, or being surprised by sickness, and not having an opportunity of making his will, but lest he should die before he could make it, gives away *personal* property with his own hands. If he dies, it operates as a legacy. If he recovers, the property reverts to him." So far as I have been enabled to find authorities or definitions, these gifts have been confined to personal property or choses in action—something which could be delivered into the hands of the donee. The *donatio causa mortis* was in many respects like a nuncupative will, and both have generally been carefully considered and examined before effect has been given to them. In the case before us, however, there was a deed duly executed and acknowledged with as much care and form as would have attended a written will; and it would operate if at all, unless put in escrow, upon delivery. At the same time, in point of fact, it was given in contemplation of immediate death, and which death took place on the following day. Now it was said that the reason why a wife could take from her husband by devise, when she could not take by direct grant, was that the death of the husband restored her legal individuality, and that the devise took effect only after his death; and consequently, at the time of the vesting of the estate, the wife was restored to her legal existence, and capable of taking as a femme sole. Still, both in devises by written wills and gifts, in contemplation of immediate death, of personal property, they were alike dependent as to their becoming operative, on the death of the deviser or donor. How far a deed, executed and placed in escrow, to be delivered in case of death, might be considered as a *donatio causa mortis*, it is not necessary to determine, as the deed in the present case was delivered at the time of execution, as I infer from the case. Practically it operated as a devise; but I am disposed to place my decision on broader grounds, and to hold that the acts of the legislature of New York, which have secured to a married woman her own separate estate, free from the disposal of it by her husband, or

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by his creditors, and giving to her unlimited powers of disposition and control over it, saying that she may manage and dispose of it as if she were an unmarried woman; also discharging the husband from any personal liability for the debts of the wife contracted previous to the marriage—that these acts, all taken together, have abrogated the old rule of the common law. They recognize and declare the distinct legal existence of the wife, as regards her separate estate. As to her estate, her identity is no longer merged in that of her husband.

It has been considered one of the beauties of the common law, one of the advantages of its rules over codes enacted by legislatures, that those rules could be modulated, as it were, by judicial legislation, and made to conform to the changing customs and the more general legislation of the country. When the legislature has distinctly spoken through its laws, it is the duty of courts to conform. In several distinct acts in different years, the legislature has provided for the rights of married women as to their separate estates. They declare that she may give her property to whom she pleases, the same as if she were an unmarried woman. There is no good reason why she may not give it to her husband, as well as to a stranger; and there is no reason why she may not as well convey directly to him as to unite with him in a conveyance to a third party, with the agreement that the third party is to reconvey to the husband.

I am of the opinion that the deed, in this case, from the wife to the husband, vested the legal estate in him, and that there should be judgment for the defendant in this case.

Judgment for the plaintiff.

[BROOME GENERAL TERM, JANUARY 24, 1860. *Mason, Balcom and Campbell, Justices.*]

31 Barh 371 contra.

OVERING *vs.* RUSSELL.

Although an alien may not acquire title to real estate, as against the true owner, by an adverse possession of twenty years, claiming title thereto in himself, yet the statute of limitations will furnish a perfect defense to an action of ejectment against him by the true owner.

THIS was an action to recover the possession of real estate. It was tried at the Delaware circuit, before Justice BALCOM. The plaintiff showed a perfect paper title, against the defendant. The defense was adverse possession. The defendant proved that he had been in possession of the premises, claiming them as owner, for 26 or 27 years; and that he had inclosed the same, and cleared and cultivated them. And he showed a perfect defense of adverse possession; unless the fact of his being an alien deprived him of the right to assert such a defense. The judge, at the circuit, held that the defendant, being an alien, could not acquire a title by adverse possession, and directed a verdict for the plaintiff.

S. Gordon, for the plaintiff.

Wm. Gleason, for the defendant.

MASON, J. This is an action of ejectment, and the defense was adverse possession for 26 or 27 years, under a claim of ownership on the part of the defendant. The defendant was all the time, and still is an alien, never having taken any steps to qualify himself to hold real estate. The judge, at the circuit, held that the defendant, being an alien, could not acquire title to these lands by adverse possession. To this ruling, the defendant by his counsel duly excepted. The defendant's counsel then insisted, and asked the court to rule that the defendant, though an alien, was capable of holding and occupying adversely, claiming title in himself, except as against the state. The judge declined so to hold, and held and decided that such holding and occupation was a nullity, and could be of no avail as a defense in this case; to which

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decision the defendant's counsel also excepted. It is not necessary to consider the question when an alien can acquire title to lands by an adverse holding.

In an issue of adverse possession of twenty years, the question of actual title is never tried. The statute bars the right of entry to a man who has been out of possession for twenty years, and another has been in, holding adversely. The plaintiff is barred of his action, because he has been shut out of possession by an adverse claimant for twenty years. The defendant in possession in such a case has a right to stand on the defensive. The real question, in all such cases, respects the plaintiff's right to the remedy, and not the defendant's title to the estate.

On the issue of adverse possession, to advert to the merits is to shift the question from the real subject of inquiry. The case never arrives at that point. It is stopped *in limine*. "*The lapse of twenty years affords a substantive insuperable plea in bar.*" It is the fixed limit to the remedy. The *tempus constitutum*, and one day beyond the twenty years is as much too late as one hundred years. This is the peremptory, inflexible rule of law, fixed by positive statute; and it says to the plaintiff in every such case, the door of justice is closed to you. You cannot be heard to show your title. It is decisive to your claim that you come too late. This alone is a perfect bar. The claimant's title may remain, but he has lost his remedy. It follows therefore, in the case at bar, if we admit that the law will cast no title upon an alien by an adverse possession, the statute still remains, and furnishes a perfect answer to the plaintiff's action of ejectment. It says to him, you have been out of possession for more than 20 years, and are thus disqualified to maintain an action to recover your land, against such adverse possession. Such is the settled law, as was held in the court of dernier resort in this state, in *Humbert v. Trinity Church*, 24 Wend. 589, and see pages 604, 605, 611, 613, 614, 615; 7 Hill, 476.

This very question was decided in the former case, where

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Judge Cowen, in delivering the opinion of the court, at pages 604 and 605, says: "It cannot be received as an objection, that the possession and claim of title are by the agents or tenants of a corporation incapable in law of taking lands." He adds: "It is said that the law will not do an idle thing; that by its own operation it will not cast a title upon one not competent to take as a purchaser, any more than it, will carry land by descent to an alien." "The answer," he says, "was properly given at the bar, that the argument confounds the acquisition of title with the cutting off the remedy. The plaintiff is barred of his action, because he has been shut out of his possession by an adverse claimant for twenty-two years." The supreme court of Massachusetts seem to go even further than this, in the case of *Piper v. Richardson*, (9 Metc. 155, 157,) where they hold that an alien may acquire title as against the state by an adverse possession long enough to bar the right of entry. There must be a new trial; costs to abide the event.

BALCOM, J. The defendant is an alien; and the question in the case is, whether he can hold the land in dispute as against the plaintiff, by adverse possession, claiming title thereto in himself, for over twenty years. An alien can hold land conveyed to him, as against every one but the state, and maintain actions for its recovery. (*Bradstreet v. Supervisors of the County of Oneida*, 13 Wend. 546. *Ford v. Harrington*, 16 N. Y. Rep. 285. 3 John. Cas. 109. *The People v. Conklin*, 2 Hill, 67. 2 Kernan, 376. 3 Hill, 79. 2 Kent's Com. 9th ed. 23, 24.) In *The People v. Conklin*, (2 Hill, 70,) Justice Bronson said: "An alien, although he may take lands by purchase, cannot take by descent; for the law, which does nothing in vain, will not cast an estate upon one who cannot hold it." (See 2 Hilliard on Real Property, 3d ed. 196.) Kent, J. remarked in *Jackson v. Lunn*, (3 John. Cas. 121,) that "An alien cannot take by curtesy, dower, &c., because they are estates created by act

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of law." (See 3 *Hill*, 79 ; 2 *id.* 67 ; 2 *Kernan*, 380 ; 3 *id.* 535 ; 3 *Barb. Ch. R.* 438.)

If a person, who acquires title to land by adverse possession, is deemed to take it as purchaser, an alien may obtain title to it by holding it adversely twenty years, claiming title thereto in himself. A devisee of real estate is deemed to take it as purchaser, and for this reason, by the common law, an alien could hold land devised to him, until inquest of office found, or until claimed by the sovereign. But in this state there is a statute which declares that land devised to an alien, not authorized by statute to hold real estate at the death of the testator, descends to the heirs of the testator, and the devise is void. (2 *R. S.* 57, § 4. 16 *Barb.* 606. 3 *Denio*, 229. 1 *Selden*, 138. 2 *Kernan*, 376. 10 *Wend.* 379.) When an alien is in possession of land, claiming to own it, the presumption is that he holds it as purchaser, for that is the only way he could take it. It would be unreasonable to presume that he claimed it in a way the law does not tolerate. I think I erred at the trial of this cause in holding in effect, that the defendant should be deemed to take the land in dispute by act of law. It is true that the law declares a person to be the owner of land when he has occupied it claiming title thereto for twenty years, and so it declares he has title to it when he receives a deed of it duly executed from the owner. But in either case the law only declares the effect of certain acts. I am inclined to the opinion, however, that the defense of adverse possession in this case can be sustained on more tenable ground than that of deeming the defendant a purchaser of the land in dispute. The statute applicable to the case, (the code not affecting it, § 73,) is that, "no action for the recovery of any lands, tenements or hereditaments, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seised or possessed of the premises in question, within twenty years before the commencement of such action." (2 *R. S.* 293,

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§ 5.) When the defendant proved he had held the land twenty years prior to the commencement of the action claiming title thereto adversely to that of the plaintiff, it established the proposition that neither the plaintiff nor his ancestor, predecessor or grantor, was seised or possessed of land within that period. This proof showed that the plaintiff had slept on his rights too long; for the land was held adversely to his title during this time, although the occupant was an alien. The statute of limitations is one of repose. Its object is to prevent suits on stale claims, and the investigation of transactions so old that the witnesses to them may be dead, or if living may not accurately remember them. Its object should be carried out by the courts. There is no more reason why a claimant of real estate should not sue an alien for it within twenty years than there is that he should sue a citizen for it within the like period. In Massachusetts, even the state must sue an alien for land within twenty years, after the right or title of the commonwealth thereto *first accrued*. (*Piper v. Richardson*, 9 *Metcalf*, 155.) There is nothing in our statutes to prevent aliens occupying lands adversely to the titles of citizens; and I think when citizens permit aliens to hold their lands adversely for twenty years, they should be barred from recovering them, in the same manner that they are when they permit citizens to hold them adversely for a like period. The plaintiff could have granted the land to the defendant so that his title would have been good except as against the state; and I think by his negligence he has permitted him to acquire a title equally as good as against himself. My conclusion is, that I erroneously overruled the defence of adverse possession at the trial; and that the verdict should be set aside and a new trial granted, costs to abide the event.

CAMPBELL and PARKER, Justices, concurred.

New trial granted.

[BROOME GENERAL TERM, May 8, 1860. *Mason, Balcom, Campbell and Parker*, Justices.]

PIXLEY vs. CLARK and others.

Individuals owning the bed of a stream, and each bank thereof, have the right to build a dam and embankment, and raise the water of the stream as high as they please, subject only to the restriction resting upon all, so to enjoy their own property as not to injure that of another person, with the qualifications and limitations incident to that rule of property.

And if they, in the exercise of that right, build, with due care, an embankment to prevent the water, when raised by their dam above the natural banks of the stream, from overflowing the lands of adjacent owners, and in consequence of raising their dam, the water finds its way through their own natural soil and below the surface thereof, by filtration, percolation or otherwise, to the land of an adjacent proprietor, the owners of such dam and embankment are not, in the absence of any unskillfulness, negligence or malice, liable to such adjacent proprietor for any damage he may sustain thereby; the injury being *damnum absque injuria*.

A party is liable for any defect in his artificial erections, which might have been remedied by reasonable care and skill, but not for any defect in the natural banks of a stream.

Where persons have the right to use the waters of a stream, for manufacturing purposes, the right to dam the water and detain it a reasonable time, follows as a necessary incident to the right of user; and they cannot be compelled to make an artificial reservoir for that purpose.

The banks of the stream are theirs, for that purpose; and so long as the water is only nominally detained for this lawful, customary and proper purpose, the adjacent land owners must submit to the indirect and consequential damages resulting to their lands from such use.

THE plaintiff brought his action on the case, for obstructing the waters of the Oriskany creek by means of a dam, and causing them to set back upon the premises of the plaintiff, to his damage. Upon the trial, at the Oneida circuit, in October, 1859, before ALLEN, justice, and a jury, it appeared that the defendants were the owners of a factory water privilege on the Oriskany creek. The plaintiff owned land above the dam, on the west side of the creek, and separated from it by a narrow strip of land, sold by him to the defendants, upon which the latter had built a permanent embankment to prevent the water, when raised by the dam above the natural banks of the creek, from overflowing the land of the plaintiff. He endeavored to show that the water confined

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by the dam and embankment, penetrated through the soil underneath the embankment, and made the plaintiff's land wet and less valuable. The plaintiff was nonsuited upon the trial, and he now moved for a new trial, on a bill of exceptions. .

F. Kernan, for the plaintiff.

D. Pratt, for the defendants.

By the Court, ALLEN, J. There may have been some question whether the standing water, the subject of complaint, was the water of the creek which, obstructed in its natural passage, had penetrated through the porous soil on the plaintiff's land, or was the surface water which accumulated by reason of the obstructed natural drainage into the creek. But the case was disposed of upon a theory which excludes that question from present consideration. The judge held and decided: (1.) That there was evidence to show that the raising of the dam by the defendants in 1857 set the water back, so that it rose opposite the plaintiff's land above the natural bank of the stream and against the artificial embankment; and he disposed of the cause as if that fact had been found by the jury. (2.) That there was no evidence to go to the jury that the flow of water by which the plaintiff's land was soaked ran through the embankment, or between the embankment and the natural bank of the stream; and he refused to allow the plaintiff to go to the jury upon these questions. (3.) That if by raising the defendants' dam, the water found its way through the natural soil of the defendants, and below the surface thereof, by filtration, percolation or otherwise, the defendants were not liable for any damage the plaintiff might sustain thereby.

A question was made upon the trial, and is renewed here, upon an offer of the plaintiff to prove that, after the erection of the embankment and the raising of the dam, the sur-

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face water did not run off as freely, but stood upon the ground until it dried up. The complaint was for obstructing the waters of the creek and causing them to flow back upon and over the land of the plaintiff—an entirely distinct and different cause of action from that embraced in the offer—and the evidence was properly rejected. The obstructing the flow, or the diversion, of a stream of water, by means of which injury is caused to the land of another, is quite another thing from destroying or disturbing the natural and usual drainage of the same land, calling for different evidence, and admitting of entirely different defenses. The cause of action offered to be proved differed in its entire scope and meaning from that alleged in the complaint, and would have depended on other and different principles for its maintenance.

There was no error in holding that there was no evidence to be submitted to the jury that the plaintiff's land was soaked by water passing through the embankment, or between it and the natural bank; or in other words, that the water found in and upon the plaintiff's land flowed over the natural banks of the stream. The plaintiff gave no evidence tending to show that the embankment was improperly constructed or insufficient to protect the land of the plaintiff from the waters of the creek, and did not attempt to show that water passed through it, or between it and the natural bank. His evidence showed the character of the soil, and that the water would readily penetrate it. The defendant gave affirmative evidence, which was undisputed, that the water did not pass onto the land over the banks of the creek. A verdict against the evidence would have been set aside, and therefore the judge properly declined to submit it to the jury.

The principal question is whether the defendants are liable to the plaintiff for the consequential damage resulting to him from the raising of the water, and keeping it at the level of the natural banks of the stream. Assuming that the water did not pass over the banks, either through the wall or other-

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wise, the raising of the embankments may be considered an act of due care. If the water found its way onto the plaintiff's land through the natural soil of the banks, and not otherwise, it is not material whether the water was or might have been kept at a higher point, inasmuch as the bank of the stream was higher than the plaintiff's land. It is not claimed that the defendants did negligently, carelessly or improperly that which they had a right to do with proper care and in a proper manner. Neither is it claimed that the acts complained of were done maliciously. In other words, the action is not based upon the negligence, unskillfulness or malice of the defendants. The right of the defendants, as riparian owners, to use their own land, including the bed of the stream with the waters flowing them, for the purposes and in the manner proved and to the prejudice of the plaintiff, is controverted by the latter, and the action hinges upon this alleged want of right. The action and the claim are of the first impression, so far as I have been able to discover with the aid of the researches of counsel, and if sustained, call for a novel application of established maxims and principles of law. Controversies respecting the enjoyment and user or diversion of streams have ordinarily arisen between different proprietors of such streams and of the lands over or through which they have flowed, and actions for obstructions of the flow have ordinarily been at the suit of riparian owners, who have in some way sustained a direct and immediate injury. The plaintiff here claims no right to the water or its use, and his lands are separated from the bank of the stream by the land of the defendants. His damages are consequential, and not the immediate and direct result of the act of the defendants, but rather the result or consequence of the character of the soil composing the banks of the stream, upon his own premises. If this action can be maintained, then every one whose lands are in any degree injuriously affected, and either made more wet or rendered less easy of drainage by reason of the raising the waters of a stream within

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its banks, the channel of which is the natural way of escape for the surplus water, may have an action; and whether the lands thus affected are more or less remote from the stream is not material, except as the distance may make it more or less difficult to point with certainty to the cause of this remote and consequential injury.

The defendants, owning the bed of the stream and each bank, had the right to build their dam and embankment and raise the water of the stream as high as they pleased, subject only to the restriction resting upon all, so to enjoy their own property as not to injure that of another person, with the qualifications and limitations incident to that rule of property. (*Broom's Leg. Max.* 172, 161.)

The rule between different proprietors of land upon a stream is well settled, and each proprietor has a right to the advantage of the stream flowing in its natural course over his land, and to use the same as he pleases for any purpose of his own, provided that such use be not inconsistent with a similar right in the proprietor of the land above or below. Here there is no complaint that the defendants restrain the flow of the stream, or diminish the quantity, or injure the quality of the water to the prejudice of any proprietor below them, or throw the water back upon the land of any proprietor above them. But the claim is that they are responsible for the defects in the natural banks of the stream, and their insufficiency, by reason of the porous character of the soil, to hold the water, without leakage, at the point to which they have a right to raise it for use upon their own premises. This, under the circumstances, is a violation of the letter of the maxim, *Sic utere tuo ut alienum non lœdas*. (9 Rep. 59.) But this maxim has never been literally enforced; for in the exercise of very many, if not most of the rights of property, there is more or less interference with the rights of others, and the rule has been construed with reference to the natural rights of all. Each man holds his property subject to the consequential injury which may result from the reasonable

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and proper use and enjoyment of the land of his neighbor. "Although some conflict may be produced in the use and enjoyment of such rights, it cannot be considered, in judgment of law, an infringement of the right. If it becomes less useful to one, in consequence of the enjoyment by another, it is by accident and because it is dependent on the exercise of equal rights of others." (*Per Thompson, C. J., Platt v. Root*, 15 *John*. 213.) In the case cited the plaintiff was in some degree injured by the acts of the defendant in detaining the water of a stream from the plaintiff's mill, while the pond of the defendant was filling. At one time for nearly three days, and on other occasions for a less time, the plaintiff's customers had been obliged to carry their grain to other mills, and yet no action would lie. The reason is obvious. Each was in the exercise of his individual rights, and in a reasonable and proper manner. So, too, the erection of a building or other structure may obstruct the lights or interfere with the privacy of a neighbor, or shade his grounds and render them less productive, but the acts are *damnum absque injuria*, and no action lies. (*Mahan v. Brown*, 13 *Wend*. 261.) *Thurston v. Hancock*, (12 *Mass. R.* 220,) decided that where one built a house on his own land within ten feet of the boundary line, and ten years after the owner of the land adjoining dug so deep into his own land as to endanger the house, and the owner of the house left it and took it down, no action lay at the suit of the owner of the house for the damage done to the house. But on the authority of *Rolle's Abr.* 565, it was held that he was entitled to an action for the damage arising from the falling of his natural soil into the pit so dug. It is claimed that every person has a right to the use of his land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots, and that the owners of those lots will not be permitted to destroy the land by removing this natural support or barrier; and to this effect is the doctrine of *Rolle*, and it was affirmed by the chancellor in *Lasala v. Holbrook*,

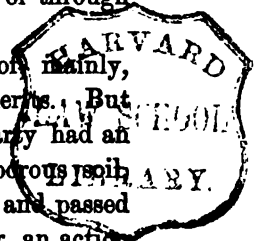
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(4 *Paige*, 169,) although it was not necessary to the decision of that case. Lord Tenterden, C. J., in giving judgment in *Wyatt v. Harrison*, (3 *B. & Ad.* 871,) cautiously refrains from expressing an opinion upon the point; and in *Radcliff's Ex'rs v. Mayor &c. of Brooklyn*, (4 *Comst.* 195,) the doctrine and the deductions from it are expressly repudiated. Bronson, Ch. J. says: "I think the law has superseded the necessity for negotiation, by giving every man such a title to his own land that he may use it for all the purposes to which such land is usually applied, without being answerable for consequences; provided he exercises proper care and skill to prevent any unnecessary injury to the adjoining land owner. The saying of Rolle may have been a wise one in his day, but it is not well adapted to our times." He recognizes the principle that "a man may enjoy his land in the way such property is usually enjoyed, without being answerable for the indirect or consequential damages which may be sustained by an adjoining land owner." It is a well received principle that "every proprietor has the entire dominion over the whole of his own estate." (*Howland v. Vincent*, 10 *Metc.* 371.) It would follow that the defendants, owning the banks of the Oriskany creek, have the right, in the proper and lawful use of the waters of the creek, to fill their banks, and the injury caused to the land owners of the neighborhood is *damnum absque injuria*. The extent to which the dictum of Rolle and the case of *Thurston v. Hancock* can be carried, is to give the party whose land is deprived of its natural support by the excavations of his neighbor an action for the soil actually transferred to his neighbor, and of which the owner is deprived. The adjacent land owner could not abstract any portion of the soil, nor cast any thing upon the ground. Subject to this qualification, a man may use his land in a reasonable manner, according to his pleasure. (*Hay v. The Cohoes Co.*, 2 *Comst.* 160, 162, *per Gardner, J.*; and see note to *Brown v. Winslow*, 1 *C. & J.* 29.) The principal case was

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decided on the ground that the plaintiff had an easement in the premises of the defendant. In *Panton v. Holland*, (17 John. 92,) the defendant was held liable for negligence in the performance of an act otherwise lawful. Woodworth, J. says: "On reviewing the cases, I am of opinion that no man is answerable in damages for the reasonable exercise of a right when it is accompanied by a cautious regard for the rights of others; when there is no just ground for the charge of negligence or unskillfulness; and when the act is not done maliciously." *Smith v. Adams*, (6 Paige, 435,) was the case of the diversion of the waters of a hidden stream which supplied a spring from which the complainant's cloth dressing establishment, situated below, was supplied with water. The bill was dismissed for want of jurisdiction, but the rule laid down by the chancellor may be regarded as authority, without advancing the argument in this case; for all that was decided by the chancellor was, that under the circumstances of that case there was no distinction between streams flowing upon the surface and those flowing beneath the surface, as regards the rights of owners of land over or through which it flowed in its natural channel.

Cooper v. Barker (3 Taunt. 99) was disposed of mainly, upon the form of the issues, rather than upon the merits. But the most that was decided was, that when a party had an artificial channel through his own fields, in a porous soil, through the banks of which the water penetrated and passed through the soil and into the cellar of his neighbor, an action would lie at the suit of the latter. The question of liability of an owner of the bed of a natural stream, for consequences resulting from the porous character of its banks, was not mooted, and was not considered. The case was more like that of *Carhart v. The Auburn Gas Light Company*, (22 Barb. 297,) where the defendants were held liable for contaminating and rendering unfit for use the waters of a stream, by suffering to flow from their works, erected a short distance



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from the banks of the stream, noxious and offensive substances, which made the water unfit for use upon the premises of the plaintiff, situated below, upon the same stream. Neither case called for a consideration of the question made here, which, if decided for the plaintiff, would require every riparian owner, seeking to use the waters of a stream by means of a pond, to see that the natural banks were made water tight; and even then he would be liable to the adjacent land owners, if their lands were less easily drained, or the surface water would not so easily pass off as when the waters of the stream were permitted to flow off without obstruction. A party is liable for any defect in his artificial erections, which might have been remedied by reasonable care and skill, but not for any defects in the natural banks of a stream. The cases most analogous to this are those in which the courts have decided that the owner of land through which water flows in a subterraneous course, has no right or interest in it which gives him an action against one who, in conducting his agricultural or other lawful operations on his own land, draws away the water and leaves a well dry upon the land of the first mentioned owner. (*Acton v. Blondell*, 12 M. & W. 324. *Roath v. Driscoll*, 20 Conn. Rep. 524. *Greenleaf v. Francis*, 18 Pick. 117.) But the principles involved are not the same. The right of the defendants to use the water of the stream for their manufacturing purposes is undisputed, and the right to dam the water and detain it a reasonable time follows as a necessary incident to the right of user, (*Van Hoesen v. Coventry*, 10 Barb. 518;) and they cannot be compelled to make an artificial reservoir for that purpose. The banks of the stream are theirs for that purpose; and so long as the water is only nominally detained for this lawful, customary and proper purpose, the adjacent land owners must submit to the indirect and consequential damages resulting to their lands from this use. A proper regard to the natural

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rights of all will not tolerate any other rule. I am of the opinion that the case was properly disposed of at the circuit, and that a new trial should be denied.

New trial denied.

[ONONDAGA GENERAL TERM, July 3, 1860. *Allen, Mullin and Morgan, Justices.*]

FARNHAM and others vs. LUTHER HILDRETH.

A judgment and execution against *Freeman* Hildreth will not authorize a sale of the property of *Truman* Hildreth, although the latter may be the individual intended.

The judgment and execution must describe the party whose property is sought to be taken, and it is not enough that the right man is made to pay a debt.

The sheriff can only execute the process against the person or property of the individual named.

Where a defendant, sued by a wrong name, fails to appear in the action, he does not waive his right to object to the misnomer, after judgment and execution.

An amendment of the record of a judgment, and the execution, made by order of the court, upon an ex parte application, after a sale of property by the sheriff, by substituting the true name of the defendant for the name erroneously inserted, will not have the effect to render the sale valid, or to divest the defendant of the title to the property levied on, and transfer it to the purchaser.

THE defendant appeals from a judgment entered on the report of a referee, in an action of ejectment. The plaintiffs claim title under one Truman Hildreth, by virtue of a sale on a judgment and execution. An action was commenced by the service of a summons and complaint, in which the defendant was named Freeman Hildreth. They were served upon Truman Hildreth. Judgment was perfected and execution issued against Freeman Hildreth, and the premises claimed by the plaintiff were sold as the property of Truman Hildreth,

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and a certificate and deed given, reciting a judgment and execution against Truman Hildreth. After the giving of the deed, and since the granting of a new trial in this action, the court, on an ex parte application by the plaintiff in the judgment, ordered the judgment roll, the docket of the judgment, and the execution issued thereon, to be amended *nunc pro tunc*, by inserting the word "Truman" whenever the word "Freeman" occurred, and the amendment was made by the clerk. There was no appearance in the action by the defendant. The referee gave judgment for the plaintiff.

W. J. Hough, for the appellant.

H. Ruger, for the respondent.

ALLEN, J. When this cause was before us, in October, 1858, we held that the judgment against Freeman Hildreth did not authorize a sale of the property of Truman Hildreth, although he might have been the individual intended. In reviewing that decision at the request of counsel, we see no reason to recall or modify it. The judgment and execution were not against Truman Hildreth, and did not authorize a sale of his property. The precise point was decided in *Cole v. Hindson*, (6 T. R. 234.) The goods of Aquila Cole were taken under a process against Richard Cole. To an action of trespass, brought for the taking, the defendants pleaded that the plaintiff, Aquila Cole, being indebted to two of them, they sued out against the said Aquila, by the name of Richard, a writ, and the said Aquila not appearing, a *distingas* was issued. Upon demurrer the plea was held bad. Lord Kenyon held that the defendants were not justified in seizing the goods of Aquila Cole upon process against Richard, and that the averment in the plea that they were the same persons did not assist them, as they had not averred that the plaintiff was known as well by one name as by the other. This case is cited and approved in *Griswold v. Sedgwick*,

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(6 Cowen, 456,) and the same principle applied to process against the person, and re-affirmed in same case, 1 Wend. 126. It is well settled that a defendant in an action for false imprisonment cannot justify the arrest of the plaintiff by a wrong name, though he is the person intended to be arrested; unless it is shown that he is known as well by one name as the other. (*Shadget v. Clipson*, 8 East, 328. *Scott v. Ely*, 4 Wendell, 555. *Gurnsey v. Lovell*, 9 id. 319. *Mead v. Haws*, 7 Cowen, 332. *Groff v. Mullen*, S. C. 5th Dist. April, 1856. *Miller v. Foley*, 28 Barb. 630. *Wilkes v. Leech*, 2 Taunt. 400.) The judgment and execution must describe the party whose property is sought to be taken, and it is not enough that the right man is made to pay a debt. The sheriff can only execute the process against the person or property of the individual named. Service of a summons upon a party by a wrong name does not give the court jurisdiction over his person, and his appearance cannot be compelled. (*Cole v. Hindson*, *supra*.) Truman Hildreth did not appear in the action commenced against Freeman Hildreth, and therefore waived none of his rights. Had he appeared and had an opportunity of pleading the misnomer in abatement, his omission to do so would have been a waiver of the objection. In *Crawford v. Satchnell*, (2 Str. 1218,) the plaintiff, who had been sued by a wrong christian name, had appeared in the original action and omitted to take advantage of the misnomer by plea in abatement, and done an act to avow that he was sued by the right name. (*Per Lord Kenyon*, in *Cole v. Hindson*, *supra*.) *Smith v. Bowker* (1 Mass. B. 76) was a case of a mistake in the addition of the defendant, who was sued by his right name. *Jackson v. Prevost* (2 Caines, 264) was as to the effect of a conviction under the act for the forfeiture and sale of the estates of persons who had adhered to the enemies of the state, passed October 22d, 1779. The lessor of the plaintiff was meant and intended by the judgment, but he was described as Joshua Pell, now or late of the manor of Pelham. The judgment was pronounced

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in October, 1782, by default, upon an indictment found in November, 1780. The father of the lessor, having the same name, died in July, 1781, and the lessor distinguished himself as Joshua Pell, jr. The court held that the indictment against him without the addition was not conclusive that he was not the person indicted, if found by a special verdict that he was meant; and say that proceedings under that act were considered analogous to convictions by bill of attainder, and with respect to the description of the persons convicted, were construed with more liberality than ordinary judicial proceedings; that the identity of the person attainted was matter of fact triable on a collateral issue, and that an incomplete description of him was not fatal. The court, in giving judgment, distinguished the case from ordinary judicial proceedings, and allowed the judgment to be helped out by extrinsic evidence to identify the party indicted, which cannot ordinarily be done in judicial proceedings. Although when there are two of the same name and only distinguished by their additions, and the addition of a defendant has been omitted, it seems it can be done, in ordinary judicial proceedings. (*Jarmain v. Hooper*, 6 M. & G. 827.) With us the addition of junior to a name is mere description of the person, and the omission of it does not invalidate any act or proceeding done by the same person. (*People v. Collins*, 7 John. 549. *Fleet v. Youngs*, 11 Wend. 522. *Padgett v. Lawrence*, 10 Paige, 170.) The judgment and execution against Freeman Hildreth did not authorize a sale of the property of Truman Hildreth.

Since the former decision, the plaintiff in the original judgment has procured the record of judgment and the execution to be amended by the substitution of the name of "Truman" wherever "Freeman" appeared, and this amendment was ordered upon an ex parte application. Whether the amendment was regular, or whether the court had jurisdiction of the person of Truman Hildreth, so that they could in effect order a judgment against him, or so correct and

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amend the record of the court that he should be made the defendant in a judgment already perfected against another person, need not be decided. It appears to be very clear that the effect claimed for that amendment cannot be given to it. The judgment and execution, and the sale under them, conveyed no title to the purchaser of the property of Truman Hildreth. The sale was void ; not merely voidable, but absolutely void. Every person attempting to enforce that judgment against the person and property of Truman Hildreth, would have been a trespasser. The sheriff in selling the real estate in question acted under a process void as against the owner of the property. The title of Truman Hildreth was not divested by the sale. He was as much the absolute owner after as before the sale. Even if the effect claimed for the order and amendment is given to them, the title of the purchasers depend and must rest, not on the void sale made two years before, but upon the ex parte order of the court. The day before the order was made, the title of Truman Hildreth had not been divested, and was not incumbered by the judgment, and the court could not by act, order or judgment, summarily divest him of his title, and in effect transfer the property to another. This would be to deprive a person of property without due process of law, and would violate § 6 of art. 1 of the constitution. The amendment cannot make that a full execution of the judgment which was not so before. The most that it could do would be to authorize the plaintiff to enforce it now, and perhaps to give it effect as a lien, as against the original defendant, from the time of the original filing and docketing. But it is sufficient for us to say at this time that it did not make title to the premises in the plaintiff.

The referee therefore erred in giving judgment for the plaintiff, and the judgment must be reversed and a new trial granted, costs to abide the event.

MORSEY, J. concurred.

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MULLIN, J. concurred in the result, and was of the opinion that the plaintiff's title was defective for other reasons.

New trial granted.

[ONONDAGA GENERAL TERM, July 3, 1860. *Allen, Mullin and Morgan*, Justices.]

RUSSELL vs. CRONKHITE.

Where an indorser, on being informed by the holder, previous to the maturity of the note, or his intention to notify him, the last day of grace, in the afternoon, to make him holden, unless he, the indorser, would say it was "all right," said "the note is perfectly good; put yourself to no trouble; it is all right." *Held*, that this was sufficient evidence of a waiver of demand and notice of non-payment, to go to a jury; and that a nonsuit was improperly granted.

THE plaintiff was nonsuited on the trial before PRATT, J. and a jury, at the Onondaga circuit. The action was against the defendant as the indorser of the promissory note of one Eno, payable at the Bank of Salina, and due January 29th, 1858. On the 27th of January the plaintiff, with the maker, who was unable to pay the note at maturity, called upon the defendant, and the maker said to him: "He, the plaintiff, has come in here to notify you on that note to make you holden." The plaintiff then told him he had got to notify him the last day of grace in the afternoon, to make him holden. The defendant said, "The note is good." The plaintiff said, "If you don't say it is all right, I shall notify you on the last day of grace in the afternoon." The defendant said, "The note is perfectly good; put yourself to no trouble; it is all right." This was the evidence, on the part of the plaintiff, and upon it the plaintiff was nonsuited. The case was submitted without argument.

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By the Court, ALLEN, J. The only question upon this appeal is whether there was not some evidence of a waiver of the demand of payment and notice of non-payment of the note by the defendant. If there was any evidence, no matter how slight, it should have been submitted to the jury. In ascertaining the mutual understanding of the parties, the circumstance which is relied upon as a waiver of the formalities necessary to charge the defendant, must be construed in the light and with the aid of the surrounding circumstances and the situation of the parties. It is very evident that the plaintiff had in view the getting of some promise, or recognition of liability, from the defendant, which should excuse the demand and notice. And if the defendant understood the object and purposes of the call, it would be for the jury to say whether the response did not waive these formalities; or if not, whether the plaintiff did not understand the defendant to waive them; and whether the defendant did not conclude that he should so understand. It is true that nothing was said of any demand of the note; but a notice of non-payment would have been insufficient for any purpose without a former demand. The fair import of the declaration of the plaintiff was that unless the defendant said it was all right, he should take steps necessary to charge him as indorser. He may not have known the technical procedure for that purpose. But it is fair to presume that he either did, or would have taken counsel, if he had not been put off his guard by the defendant. The defendant did tell him the note was good; he need give himself no further trouble; it was all right. In other words, he told him, in language not to be misunderstood, that he need take no step to charge him as indorser, and that the note was good as indorsed by him, and all right without that. In *Coddington v. Davis*, (1 Comst. 186,) a waiver of "protest" was held to include the demand of payment and notice to the party to be charged, upon the ground that the term "protest," in a popular sense, and as used among men of business, included all the steps

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necessary to charge an indorser. In this case it would be for a jury to say in what sense the declarations of the parties were made and understood at the time. When an indorser, a few days before the maturity of a note, writes to the holder and informs him that the maker has failed, acknowledges his liability and asks indulgence, the holder is relieved from demanding payment and giving notice of non-payment. (*Spencer v. Harvey*, 17 *Wend.* 489.) Nelson, Ch. J. says: "It may fairly be said that the omission to give notice is attributable to the interference, and Butler should not now be permitted to take advantage of it." See also *Leffingwell v. White*, (1 *John. Ch.* 99.) The maker of the note here was the son-in-law of the defendant, and the inability of the maker to pay was well known to the indorser, and that the presentation of the note would have been an idle ceremony. And I think it was for the jury to say whether it was not waived. The judgment must be reversed and a new trial granted; costs to abide the event.

[ONONDAGA GENERAL TERM, July 8, 1860. *Allen, Mullin and Morgan*, Justices.]

**STRONG vs. STRICKLAND and THE WATERTOWN BANK AND
LOAN COMPANY.**

Although a mortgagor has parted with the fee of the mortgaged premises, by an assignment of his property in trust for the benefit of creditors, yet he may maintain an action to cancel and set aside the mortgage, on the ground of usury.

An action of that nature cannot be brought by the assignees of the mortgagor. Where a mortgagor makes a general assignment of his property to trustees, in trust for the benefit of creditors, and conveys the mortgaged premises to the assignees upon the same trusts declared in the assignment, and as a part of the assigned property; the mortgage debt being placed among the preferred debts provided for and directed to be paid; this will not estop the mortgagor from bringing an action to cancel and set aside the mortgage on the ground of usury.

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THE plaintiff brought his action to cancel and set aside a mortgage given by him to Strickland, and by the latter assigned to the Watertown Bank and Loan Company, for usury. The case was tried at the Jefferson circuit, before Justice BACON, and judgment given for the plaintiff, declaring the mortgage and the bond accompanying the same usurious and void, and enjoining and restraining the foreclosure of the mortgage. Upon the trial the usury was not controverted. The bond and mortgage were given in April, 1850, and in August, 1852, the plaintiff, the mortgagor, made a general assignment for the benefit of creditors, to the mortgagee Strickland and one Alden Adams, and conveyed the mortgaged premises to the assignees upon the same trusts declared in the assignment, and as a part of the assigned property. The mortgage debt was placed among the preferred debts provided for by the assignment and directed to be paid. All the preferred debts except this and another mortgage have been paid by the assignees, and all the debts of the second class have been compromised and paid, and some of the debts of the third and remaining class have been paid. All the assigned property is exhausted, with the exception of the mortgaged premises, which are worth about \$2500, and the debts of the mortgagor, other than this mortgage debt, still unpaid, amount to about \$2000. In June, 1857, for a valuable consideration the mortgagee assigned the mortgage to the Watertown Bank and Loan Company, who had no notice of the usury, but had knowledge of the assignment and the provision made for its payment, and had commenced a statutory foreclosure of the mortgage when this action was brought.

The defendants appealed from the judgment at circuit.

J. F. Starbuck, for the appellants.

John Clarke, for the respondent.

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By the Court, ALLEN J. The plaintiff properly brought this action. Although he has parted with the fee of the mortgaged premises, it is only in trust for the payment of his debts in a prescribed order and by the agency of the trustees. He is interested in having the assigned property appropriated for the purposes to which he has devoted it—the payment of debts for which he is personally liable. To this extent he is interested in the mortgaged premises as a part of the assigned property, and it is a pecuniary interest which the courts will protect. And from his right to any surplus that may remain after the payment of debts, it is not a matter of indifference whether the property is sold under the trust or at a final sale at auction, upon the foreclosure of the mortgage. He is entitled to have the premises sold to the best advantage under the trust, that it may go the farthest in the discharge of his debts; unless the defendants have the legal right to withdraw the property from the trust by selling the same upon the mortgage. And this right depends upon the validity of the mortgage, and the plaintiff alone can object to the foreclosure of the mortgage and the sale of the premises. He alone can set up usury, as against the mortgagee. Such a defense can only be set up by a party to the usurious contract, or one who represents him as a privy in blood or estate. (*Green v. Morse*, 4 Barb. 332.)

The assignees, who had taken merely the equity of redemption, could not have sustained this action. (*Pratt v. Adams*, 7 Paige, 615. *Post v. Dart*, 8 id. 639. 7 Hill, 391. *Shufelt v. Shufelt*, 9 Paige, 137.) It would have been a sufficient answer that they had taken a conveyance of the premises subject to the mortgage and as a fund for the payment of the mortgage debt. An action by them to set aside the security would have been inconsistent with the trust while they had assumed to pay the debt secured by it. The plaintiff, therefore, as the original borrower, and a party to the mortgage and personally bound for the payment of the debt, and with a subsisting interest in the mortgaged premises to protect

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and preserve, was the only person who could maintain an action to rescind the security, for usury. Adams, the co-assignee with Strickland, was not a necessary party to the action. The trust created by the assignment, the title of the assignees nor their duties, can be affected by the judgment, and they as assignees have no interest in the result. The trust remains to be executed as if this action had never been brought. The rights or duties of the assignees are not to be, and cannot be, settled in this action. (*McMahon v. Allen*, 12 How. 39. *Gleason v. Thayer*, 24 Barb. 82. *Van Nest v. Latson*, 19 id. 604.) The only question upon the merits is as to the effect of the assignment by the plaintiff, and the provision therein made for the payment of the mortgage debt, upon the mortgage itself as a security; whether it made that valid which was before invalid. It is claimed by the defendants that such recognition of the debt by the plaintiff precluded him from objecting that the mortgage was not valid. But this does not follow from any of the cases cited, nor is it supported by any principle. A party may pay a usurious debt, or transfer property in payment of such debt, and the payment and transfer will be irrevocable. So he may pay in part, or dedicate specific property to the payment of a usurious debt, but such partial payment or specific dedication will not remove the taint of usury from the original contract. The contract will have been executed to the extent of the payment or specific provision, but the contract, so far as it remains executory, and all securities are still within the condemnation of the statute against usury. (*Pratt v. Adams*, 7 Paige, 615.) *Murray v. Judson*, (5 Seld. 72,) and *Green v. Morse*, (4 Barb. 332,) relate to the duties of an assignee charged with a trust for the payment of a usurious debt, and decide merely that he cannot thwart the intent of the assignor and object to the payment of a debt particularly mentioned and directed to be paid, on the ground of usury. They proceed upon the principle that the defense of usury is personal, and only available to the borrower or

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one in privity with him. It necessarily follows from this doctrine that the defense may be waived by him who alone can set it up, and that a stranger cannot overrule his election to waive it. Judge Gardiner, in *Murray v. Judson*, which was an action by creditors of the assignor seeking the payment of their debts in preference to a usurious debt preferred in the assignment, says, "When the assignment was executed, the debtor had the right, as against the complainant, in good faith to dispose of his property as he pleased. He could have paid the usurious judgment. This is conceded; and if so, no good reason can be assigned why he could not appropriate property for that purpose, and direct its application by a trustee. The assignment was not a contract with the holder of the judgment, or a mere security for that debt, but the setting apart of property for the payment of a specific demand in the mode designated." The learned judge here briefly enumerates the doctrine of the cases cited and the principles upon which they stand. The last remark quoted decides this case. The assignment relied upon here was not a contract with the holder of the mortgage, and was no way affected by the validity of that instrument as a security. The assignment was valid, and might be made the means of paying the mortgage debt, but only by the proper execution of the trust, and not by purging the mortgage of the statutory taint of usury. If the mortgage can be paid under the assignment, and by means of the property appropriated to that purpose, it is well; but if not, the parties are in the same situation as if no assignment had ever been made. Suppose the assignor's debt was represented by the note of the assignor, it would not be claimed that because he chose, in creating a trust for the payment of his debts, to direct its payment with his other liabilities, he would be estopped, in an action against him upon the note, from alleging the usury. Here the mortgagor has directed the mortgage debt to be paid *pro rata*, or in a class with other debts, and it is strenuously urged that this gives the mortgagee the right to be paid in prefer-

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ence, and by a sale of the mortgaged premises to this extent, to the exclusion of the other creditors of the same class. This will not answer. If he claims the benefit of the assignment he must take under it and in accordance with its provisions, and not in hostility to it. There is no estoppel in the case. The assignee of the mortgage, relying as is claimed, and doubtless truly claimed, upon the provision in the assignment, still has all the benefit of the provisions made for the payment of the debt. There was no representation, express or implied, that the mortgage was or was not usurious. It is not more a representation that the mortgage was valid than a partial payment would have been. The trust is probably irrevocable, and the holder of the mortgage is entitled to the amount actually and equitably due thereon from the trust fund, which is precisely the declaration of the trust deed. An estoppel in pais exists when a party, either by his statements or his conduct, has induced a third person to act in a particular manner; and it must appear, 1. That he has made an admission, or done some act clearly inconsistent with the evidence he proposes to give; 2. That the other party has acted upon the admission; and 3. That the latter will be injured by allowing the truth of the admission to be disproved. (*Dezell v. Odell*, 3 Hill, 215. *Welland Canal Co. v. Hathaway*, 8 Wend. 480.) But an admission made to A. in reference to one matter, and not to B. nor with any intention to influence his conduct, is no estoppel as respects B. (*Reynolds v. Lounsbury*, 6 Hill, 534; and see *Pennell v. Hinman*, 7 Barb. 644; *Jackson v. Brinckerhoff*, 3 John. Cas. 101.)

A direction to Adams and Strickland to appropriate certain property to the payment of the mortgage debt, with other debts, does not estop the mortgagor from alleging usury, when the bond is sought to be enforced against him personally, or the mortgage against the property. There was no error in the judgment at circuit. But as the judgment declares the mortgage void as a lien and charge upon the premises, to avoid all question for the future it may be modified by pro-

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viding in terms that the judgment shall not affect the claims of the mortgagee, or assignee of the mortgagee under the assignment, and as thus modified the judgment will be affirmed with costs.

[ONONDAGA GENERAL TERM, July 8, 1880. *Allen, Mason and Morgan, Justices.*]

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DAINS vs. PROSSER.

Prima facie, all the personal property of a judgment debtor is liable to levy and sale upon execution. If he would claim exemption for any of such property, he must bring himself and his property within the exceptions of some statute, by proper proof.

A wagon is not exempt, at law, as such, from levy and sale on execution. But when customarily used in connection with a horse or horses, and harness, it may constitute a part of a *team*, and will come within the meaning of the word team as used in the statutes of exemption, and not be liable to be sold upon execution.

The decision to the contrary, in *Morse v. Keyes*, (6 How. Pr. Rep. 18,) overruled.

But where a party claims the exemption of a wagon, as being a part of a team, he is bound to show, affirmatively, that the team is worth, as a whole, less than \$250, or does not exceed in value that sum.

If there is no proof to show what the value of the team was, as an entirety, or what was the value of the several parts, or of any part thereof, except the wagon, the exemption cannot be allowed.

THIS was an appeal from a judgment of the county court of the county of Yates in favor of Prosser against Dains. Dains sued Prosser in a justice's court to recover the value of a wagon taken by Prosser and sold. Prosser justified the taking, as a constable, under an execution against Dains, and Dains claimed that the property was exempt as constituting a part of a team. The justice rendered judgment in favor of Dains for \$12 damages and \$3.64 costs, from which judgment Prosser appealed to the county court of Yates county, which court reversed the judgment of the justice.

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From the judgment rendered on that decision, this appeal was brought.

S. H. Welles, for the appellant.

A. V. Harpending, for the respondent.

By the Court, E. DARWIN SMITH, J. Prima facie, all the personal property of a judgment debtor is liable to levy and sale upon execution. If he would claim exemption for any of such property he must bring himself and his property within the exceptions of some statute, by proper proof. No property in his possession is exempt *per se*. The plaintiff in this case duly proved that he possessed the character entitling him to an exemption of the property specified in the provisions of the revised statutes exempting certain property from sale on execution, and also specified in the acts of 1842 as amended in 1859. The only question remaining is, whether his wagon was exempt. It was not exempt at law as a wagon, and so far the case of *Morse v. Keyes* (6 How. 18) is correct. Nor would one horse, or two horses, or a harness, be any more exempt, as matter of law. The question is one of fact, in respect to each and every article of property claimed as exempt, whether it is or is not exempt. (14 John. 434.) If this wagon is exempt, it is because it is embraced in the exemption of a team. It was held in *Hutchins v. Chamberlain*, (11 N. Y. Legal Observer, 248,) which was a general term decision in this district, that a team consists of one horse, or two horses, with *their harness and the vehicle to which they are customarily attached for use*. That all of these particulars are embraced in the word *team*, and that a horse and harness, and cart or wagon, or other vehicles, are all, when used together, and each and every one of them, as part of the team, is exempt from execution under the act of 1842. To the same effect is 8 How. 75; and 5 id. 228; and 27 Barb. 505. These cases should be considered as over-

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ruling *Morse v. Keyes*, which is in obvious conflict with the spirit and policy of the statute. Within these cases the wagon in this case might, in connection with a horse, or a span of horses and harness, compose part of a team. But it was essential, to make out the exemption, that the team as thus composed should come within the prescribed value as fixed by the statute. The team must not exceed, by the act of 1842, \$150, and as amended in 1859, \$250 in value. There was no proof before the justice what the value of the team was, as an entirety, or what the value of the several parts or of any part thereof was, except this wagon. The wagon, it appears, was a democrat wagon, but whether it was customarily used with one horse or two, and what was the value of the horse or horses and harness, does not appear. They may have exceeded \$150 in value. If a single horse, it may have been worth \$150, or \$200, or more, with or without the harness. The plaintiff claimed exemption for the wagon as part of a team. He was bound to show affirmatively that the team which he claimed to have exempted under the statute was worth, as a whole, less than \$250, or did not exceed in value that sum. I think the county judge rightly held that the plaintiff had not by proper proof brought himself within the terms of the statute, and that the judgment of the county court should therefore be affirmed.

Judgment affirmed.

[MONROE GENERAL TERM, September 8, 1860. *Smith, Johnson and Keat*, Justices.]

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Under the general denial in an answer, authorized by the code, evidence of a distinct affirmative defense is not admissible. The only evidence which the defendant is entitled to give, in such a case, is limited to a contradiction of the plaintiff's proof, and to the disproof of the case made by him.

Hence, where, in an action for an unlawful taking and conversion of property, the defendant, under a general denial in his answer, offered to prove that he took the property as sheriff, under and by virtue of an execution, by and with the consent of the plaintiff, who drove the property to the place of sale, and actually bid on it at the sale; *Held* that this evidence, not being offered for the purpose of disproving the *taking*, but to *justify* the taking by showing a *license*, was not admissible.

Where a party is in possession of property, claiming it as his own and proves a sale thereof to him by the former owner, sufficient as between them, to pass the title, this is sufficient proof of property to entitle him to recover against a wrongdoer, for taking and converting it.

And if, in such an action, the defendant justifies the taking, as sheriff, by virtue of an execution, he will not be allowed to show that the sale of the property to the plaintiff was fraudulent, without prior proof of a lawful execution.

A PPEAL from an order made at a special term, denying a motion for a new trial. The action was for the wrongful taking and conversion of a cow, horse, wagon and other personal property. The answer denied the complaint, and every part of it, and also set up that the property was the property of James Beaty; that George Youngs had obtained a judgment in the supreme court against James Beaty; that Swarthout, the defendant, was the sheriff of Schuyler county, and that he took the property by virtue of an execution issued on said judgment; and that Smith, the other defendant, acted in aid of the officers. The plaintiff obtained a verdict at the circuit. The defendants, on a bill of exceptions, moved for a new trial at special term, which motion was denied, and the defendants appealed.

D. J. Sunderlin, for the appellant.

D. B. Prosser, for the respondent.

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By the Court, E. DARWIN SMITH, J. The decision of the court of appeals in the case of *Lanning v. Carpenter*, (20 N. Y. Rep. 447,) disposes of most of the questions raised upon the trial of this action. The only point seriously urged upon the argument arises upon the offer to prove that the defendant, as sheriff of the county of Schuyler, took the property in question by virtue of the execution mentioned, by and with the consent of the plaintiff, and that the plaintiff drove the property to the sale and actually bid on it, at the sale. This offer was objected to, on the ground that no such defense was set up in the answer, and the objection sustained, and the defendant's counsel duly excepted. Under the general denial of the code, evidence of a distinct affirmative defense is not admissible. The only evidence which the defendant is entitled to give, under such general denial, is limited to a contradiction of the plaintiff's proof and to the disproval of the case made by him. The action is brought for an unlawful taking of the property in dispute. The claim made in the complaint is that the plaintiff, being the owner and possessor of such property, the defendants at the time &c. *unlawfully took the said property from the plaintiff and converted the same to their own use*. Under the former system the action would have been called *trespass de bonis*, &c. Replevin in the cepit also would have lain, upon the allegations in this complaint. The plaintiff, to maintain the action, must necessarily prove a *taking*. Such proof was given, and the plaintiff made out a clear case of the taking of this property by the defendant under and by virtue of an execution against James Beaty, the father of the plaintiff, and under an express claim to take the same on such execution. The taking proved was *prima facie* tortious. Such must be any and every taking from the possession of another, presumptively, until the contrary appears. The plaintiff was not bound in the first instance to prove any thing more than a formal actual taking of the property from his possession. Such taking the defendant was called upon to *justify*. If he could prove that the

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taking complained of was *by and with the consent of the plaintiff*, this would have been a perfect defense, for there obviously can be no trespass in taking a man's property by and with his *express consent*. *Volenti non fit injuria*. But this proof was not directed to disprove the *taking* of the property, but to *justify such taking*. It was directed to prove a *license*, which was always pleaded specially in the action of trespass, and was not provable under the general issue. (*Chitty's Plead.* 494. 2 *Camp.* 378. *Phil. Ev.* 507, 10th ed.) The decision of the court was clearly right upon this question. The other exceptions, I think, were properly disposed of at special term. The defendant was undoubtedly entitled to contradict James Beaty, and disprove the plaintiff's title to the property, but that was not really what he proposed, to any practical purpose. The offer to show that the property was not the property of the plaintiff, and to contradict Beaty, were doubtless understood by the circuit judge, and intended by counsel, as an offer to show that the sale from James Beaty to the plaintiff was fraudulent. This the defendant was not entitled to do, without prior proof of a lawful execution; and this was the view taken of this question in the charge of the judge, which on this point was not excepted to, and was clearly right. The plaintiff was in possession of the property, claiming it as his own, when it was levied on, and proved a sale of it to him by his father, sufficient as between them, to pass the title. This was clearly sufficient proof of property to entitle him to recover against a wrongdoer. The application to amend by inserting a supplemental answer was properly denied. It was not such an amendment as should be made at the circuit. It was, in any point of view, an application addressed to the discretion of the judge, in respect to which no exception could be taken. The case was rightly disposed of at the circuit, and a new trial should be denied.

[MONROE GENERAL TERM, September 8, 1860. *Smith, Johnson and Knox, Justices.*]

THE CENTRAL CITY BANK *vs.* DANA and SIMS.

The giving of a promissory note, by a debtor, without any additional security, does not pay or satisfy the original debt. Although it is a payment *sub modo*, yet the creditor may always sue and recover upon the original consideration, on producing and cancelling the note at the trial.

H. & H. borrowed of the plaintiffs two sums of \$1000 and \$1750 and gave their joint notes, indorbed by the defendants, to secure the payment of the amount. These notes being unpaid at maturity, and protested for non-payment, the plaintiff, at the request of the defendants, discounted the note of the latter for \$2750, and the proceeds were used in taking up the previous notes for \$1000 and \$1750, which latter notes were then surrendered to the defendants and canceled, and the names of the makers and indorsers erased. The \$2750 note being protested for non-payment, at maturity, was sued upon by the plaintiff, and the action being defended by the indorsers, on the ground of usury, judgment was given for the defendants. The plaintiff then brought this action, upon the \$1000 and \$1750 notes.

Held, that the defendants, having by their defense in the former suit, asserted and declared the \$2750 note to be void for usury, and having elected to annul and disaffirm it, for that reason, it ceased thereafter to be available to them for any purpose; and that they were estopped from setting up that note as a valid payment of the \$1000 and \$1750 notes, in this action.

Held also, that the record and proceedings in the former suit were properly admitted, to show that the defendants had disaffirmed the \$2750 note and had insisted on its invalidity.

APPEAL from a judgment entered upon the report of a referee. The firm of J. F. & C. Hicks, on the 11th day of July, 1857, borrowed of the plaintiff \$1000, and gave their joint note with the defendants as *accommodation* indorsers, to the plaintiff, to secure the payment of the loan in thirty days. Also, on August 11th, 1857, said firm made another loan of the plaintiff of \$1750, on like security, payable in two months. The money was received from the plaintiff by J. F. & C. S. Hicks, or one of them. Both these notes were protested at maturity, and remained unpaid until November 2d, 1857. Previous to this date, J. F. & C. S. Hicks had failed in business and were then insolvent. The payment of the notes therefore fell upon the indorsers, one of whom (Dana) applied to the plaintiff to discount their note to raise money to pay said two notes with. Charles S. Hicks,

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one of the firm of J. F. & C. S. Hicks, was at that time indebted to the plaintiff, upon an overdraft, in the sum of \$201.10. The plaintiff imposed as a condition of the discount for the defendants, the payment of the overdraft, which was finally assented to by Dana. The note of Sims, indorsed by Dana, for \$2750, dated November 2d, 1857, was accordingly discounted by the plaintiff, and the proceeds used by the defendants toward paying the two notes above mentioned of \$1000 and \$1750, Dana paying the overdraft. The two notes were thereupon surrendered to Dana and canceled, and the names of makers and indorsers erased. The \$2750 note was protested for non-payment at maturity, and was sued by the plaintiff. The action was defended by the present defendants, on the ground that the same was usurious, and the issue was tried before a jury, June 26, 1858, and a verdict rendered for the defendants. The judgment rendered thereon was appealed from by the plaintiff, and duly affirmed on appeal to the general term, April 23, 1859. The plaintiff thereupon brought the present action upon the \$2750 note, dated November 2, 1857. The 2d and 3d counts were upon the \$1000 and \$1750 notes. The answer of the defendant alleged, 1st. A former verdict on the merits on the \$2750 note. 2d. A former judgment on a verdict upon the same note. 3d. A denial of the existence of the two notes of \$1000 and \$1750, or that plaintiff has or holds any such notes. 4th. Payment of said last mentioned notes. 5th. Payment, surrender and release of said notes. 6th. Accord and satisfaction of said notes. 7th. Setting up the former action as a bar to this action entirely; alleging both to be for the same identical cause of action. This issue was referred to the Hon. Joseph Mullin, referee, before whom it was tried, on the 29th day of December, 1859. The referee nonsuited the plaintiff and dismissed the complaint as to the note of \$2750, but reported in favor of the plaintiff on the two notes of \$1000 and \$1750 which had been canceled and surrendered. This appeal was brought from the judgment rendered on such report.

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Sheldon & Brown, for the appellants.

G. H. Middleton, for the plaintiff.

By the Court, E. DARWIN SMITH, J. The referee, I think, disposed of this case correctly. The giving of the \$2750 note did not discharge absolutely, or satisfy, the two notes of \$1000 and \$1750. It was a mere renewal of those notes; the making simply of a new promise to pay the defendants' own debt. The giving of a promissory note of a debtor, without any additional security, has never been held to pay or satisfy the original debt. It is a payment, it is true, *sub modo*, but the creditor may always sue and recover upon the original consideration by producing and cancelling the note at the trial. The effect of taking the new note was nothing more, upon the actual rights of the parties, than an extension of the time of payment of the debt; and this extension, not affecting the rights of sureties, is of no consequence. The plaintiff was entitled to count upon the original notes of \$1000 and \$1750, as he did, as valid notes, and make such proof on the trial as should be necessary to avoid any defense that might be interposed. On its appearing on the trial that these notes were canceled and in the hands of the defendants, the presumption of payment arising from these facts, the plaintiff was necessarily called upon to repel. The notes themselves, in the hands of the defendants and canceled, established *prima facie* payment, as alleged in the defendants' fourth and fifth answers. But as no reply was allowable to those answers, the plaintiff was at liberty, under section 168 of the code, to give any proof in avoidance thereof, which would have been a good legal reply thereto. The proof given consisted in showing how those notes came to be canceled and surrendered, and showed that they were not in fact ever paid but simply given up for a new note of the defendants for \$2750, and that this new note was not paid. On this proof and on the production and surrender of the \$2750 note,

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I do not see why the plaintiff was not entitled to recover, independently of the questions relating to the validity of this note. It was a protested note, not paid, in the hands of the creditors, given confessedly in renewal of the previous notes of \$1000 and \$1750 on which the defendants were indorsers, duly fixed. But if this were not so, and the plaintiffs were bound primarily to resort to their remedy upon the \$2750 note, the election of the defendants to disaffirm the contract contained in and made by this new note, for usury, remitted the plaintiffs to their original rights. (*Shepherd v. Hamilton*, 29 Barb. 156. *Le Farge v. Herter*, 5 Seld. 241.) The record and proceedings in the suit upon this \$2750 note were properly admitted to show such election on the part of the defendants. They were not received to establish that such note was in fact usurious, as a basis of an affirmative claim on the part of the plaintiff, but simply as evidence that the defendants had disaffirmed such note and had insisted on its invalidity. It is true they had gone to trial and established the usury. That was superfluous. In the case of *Le Farge v. Herter*, the defense of usury was about to be interposed, and in the case of *Shepherd v. Hamilton* it was set up in a sworn answer. All that was necessary on the part of the plaintiff was to show that the note which the defendant in this suit set up as a payment of the previous notes they had previously, by some distinct act, asserted and declared to be void for usury, and had definitively elected to annul and disaffirm for that reason. It ceased, thereafter, to be available to the defendants for any purpose, and they were estopped from setting it up as a valid payment of the \$1000 and \$1700 notes, in this action. These notes were given for a valid debt, and cannot be discharged short of actual payment; and the law is not yet subject to the reproach that a just debt can be paid and satisfied by a new promise of the debtor, unfulfilled, and which he can avoid at his pleasure. It is a mistake to claim that the plaintiff was allowed in making this proof to give evidence of the commission of a

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criminal offense, for the purpose of enabling them to recover. The plaintiff's right of action was not based upon the usury which infected the \$2750 note, but upon their original debt, and the proof given of the recovery of judgment merely disproved the pretense of payment by such note, and showed that such new note was invalidated and adjudged void at the special instance and distinct election of the defendants. Hence it could not operate as payment of the two notes for which it was given, but instead of discharging them they became, as the learned referee held, by force of such adjudication, valid and operative instruments, and the plaintiff was entitled to recover thereon. As we are satisfied that the case was rightly decided by the referee, I think we may affirm the judgment; but if we had come to an opposite conclusion, I should have had some hesitation about reversing it, for the reason that the reference, being to one of the justices of this court, I am inclined to think it was a mere arbitration.

Judgment affirmed.

[MONROE GENERAL TERM, September 8, 1860. *Smith, Johnson and Knox, Justices.*]

HUNTINGTON vs. POTTER and others.

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It is well settled that each member of a partnership, after dissolution, has the same right and authority to collect, compound and release the debts of the firm, existing at the time of such dissolution, that he had before.

As the law gives to any debtor of a partnership the right to settle with either member of the firm and take a release, after dissolution, it will not impute bad faith to such debtor, in making such settlement, from the fact that he had knowledge of the dissolution.

Notice of the dissolution, merely, is not enough to put the debtor upon inquiry in respect to a previous assignment of his debt by his creditors.

Where a debtor of a partnership, after dissolution of the firm and with notice thereof, settles with one of the partners and takes a discharge, valid in law as between them, without any notice of a previous assignment of the debt against him, to a third person, by the partnership, the discharge is conclusive upon the assignee.

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As a general and well established rule, the assignee of a demand is not protected against the subsequent dealings of his assignor, with the debtor, where the latter acts in good faith.

APPEAL from a judgment entered upon the report of a referee. The plaintiff, in his complaint, alleged that the firm of J. L. Greenman & Co., which is composed of J. L. Greenman and Joseph S. Potter, on the 6th day of October, 1858, assigned to him certain claims which said firm had against Jerome B. Fellows and others. That said Potter, one of said firm, after a dissolution of their partnership and on the 23d day of December, 1858, compromised and settled the said claims with Fellows, and released him therefrom. The avails of said compromise were transferred to Caleb N. Potter, a creditor of the firm of J. L. Greenman & Co. The plaintiff prayed that the settlement or compromise between Fellows and Potter, and the written stipulations and releases accompanying the same and all counterparts thereof, and the rules and orders entered in certain actions thereon or by virtue thereof, be vacated, set aside, annulled, canceled and discharged and held for nothing, and that said settlement and compromise be entirely rescinded, and the plaintiff restored to his original rights, &c. The referee found the following facts: 1st. That on and previous to October 5th, 1858, the defendants Greenman & Joseph S. Potter were partners in trade in the city of Syracuse, in the business of storage and forwarding, under the name and style of J. L. Greenman & Co., and that on said day the plaintiff was an accommodation indorser, liable as such, for about the sum of \$5000. 2d. That on the day aforesaid the firm of L. A. Phillips & Co. of the city of New York were indebted to J. L. Greenman & Co. in the sum of about \$5000, of which firm the said J. L. Greenman & Co. claimed that the defendant Jerome B. Fellows was a partner, and suits were then pending in favor of said Greenman & Potter against said Fellows and the other members of the firm of L. A. Phillips & Co. 3d. On the said 6th day of October said Greenman,

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in the name of J. L. Greenman & Co., executed and delivered to the plaintiff, for the purpose of securing and indemnifying him against his indorsements, an assignment of the demands in suit against the said L. A. Phillips & Co., the said Potter assenting to the assignment. 4th. That on the 9th day of October, 1858, the said partnership between Greenman and J. S. Potter was dissolved by mutual stipulations in writing, and notice of such dissolution was duly published in the Onondaga Standard, printed in the city of Syracuse; the first publication being on the 16th day of October, 1858. 5th. On the 23d day of December, Joseph S. Potter, by an arrangement between him and Fellows, and without the knowledge or consent of the plaintiff or J. L. Greenman, compromised the said demands so far as the individual liability of said Fellows was concerned, and upon such compromise executed the stipulations and releases in writing set forth in the complaint; receiving on such compromise a check for \$100 and two notes of \$450 each, signed by James H. Leeds and indorsed by Fellows, which the defendant J. S. Potter soon afterwards paid over to the defendant Caleb N. Potter upon an indebtedness due from the firm of J. L. Greenman & Co. to the said C. N. Potter, and the said C. N. Potter still holds said notes. 6th. Soon after the execution of said releases and stipulation the orders of discontinuance were entered, copies of which were set out in the complaint. 7th. The said Fellows had at the time of the said settlement notice of the dissolution of said partnership, but had no notice of the assignment of the demands to the plaintiffs. And the referee, as conclusions of law, found: 1st. That the assignment to the plaintiff was a valid assignment, and transferred to him the said demands. 2d. That after such transfer J. S. Potter had no right to settle or compromise the demands, and that Fellows knowing of the dissolution could not be deemed to have acted in good faith. 3d. That the plaintiff was therefore entitled to judgment, setting aside and cancelling such settle-

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ments and compromises and all proceedings based thereupon, with costs against the defendants J. S. Potter and Fellows.

From the decision entered on this report, the defendants J. S. Potter and Fellows appealed.

Wm. V. Bruyn, for the appellant J. S. Potter.

Sheldon & Brown, for Fellows.

Gardner & Burdick, for the respondent.

By the Court, JOHNSON, J. I am unable to see how the conclusion of law, that the defendant Fellows "cannot be deemed to have acted in good faith," in settling the demand with Potter and taking a release, can be sustained, upon the facts found by the referee. The fact is distinctly found that at the time of such settlement and release, Fellows had no knowledge of the assignment to the plaintiff. It is found that he knew of the dissolution of the partnership to which the demand was originally due; and from this fact, as plainly appears from the report, the referee held that such legal conclusion followed. In this, however, the referee was clearly mistaken. It is well settled upon abundant authority, that each member of a partnership, after dissolution, has the same right and authority to collect, compound and release the debts of the firm, existing at the time of such dissolution, that he had before. (*King v. Smith*, 4 C. & P. 106. 19 E. C. L. 299. 3 Kent's Com. 48, 49. *Salmon v. Davis*, 4 Binn. 375. *Murray v. Mumford*, 6 Cowen, 441. *Napier v. McLeod*, 9 Wend. 120.)

The power to create obligations against the firm, by one member, ceases with the dissolution, as between the partners themselves, and as respects all persons who have notice of the dissolution, or who have had no dealings with the partnership previously. But such dissolution does not affect the authority of each partner to receive debts, and to discharge

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existing obligations in favor of the partnership, while any thing remains to be done in winding up all its affairs. For this purpose the partnership, and all the powers of each partner during its existence, are deemed to continue after dissolution. (*Van Keuren v. Parmelee*, 2 Comst. 523. *Story on Part.* § 115.)

As the law gives any debtors of a partnership the right to settle with either member of the firm and take a release after dissolution, the same as before, surely it will not impute bad faith to such debtor in making such settlement, from the fact that he had knowledge of the dissolution. Neither the fact of the dissolution nor the debtor's knowledge of it is a circumstance which affects, in the least, his right thus to settle and take his release. The presumption is, that every man acts in good faith in exercising a right which the law secures to him, until the contrary is proved. Notice of the dissolution, merely, was not enough to put Fellows upon inquiry in respect to a previous assignment of his debt by his creditors. It was a fact which had no legitimate bearing upon the question of assignment, and did not in legal contemplation lead to any such inquiry.

In the case of *Gram v. Cadwell*, (5 Cowen, 489,) the debtor released had notice of the agreement, which operated as an assignment of the partnership effects to the other partner; and this notice distinguishes the case, in this aspect, from that of *Napier v. McLeod*, *supra*.

The case at bar, upon the facts as found by the referee, presents the naked case of a debtor settling with his creditors and taking a discharge, valid in law as between them, without any notice of the plaintiff's prior rights. It seems to me, upon well settled principles, the discharge is conclusive upon the plaintiff. As a general and well established rule, the assignee of a demand is not protected against the subsequent dealings of his assignor with the debtor, where the latter acts in good faith. This proposition does not need fortifying, at this day, by the citation of authority. Indeed the referee

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virtually so held. The error into which he fell, manifestly was, in supposing that a settlement and release, between a debtor and a member of a firm after dissolution, stood upon grounds somewhat different, as respects a prior assignee of the firm, from a settlement and release before dissolution, though after assignment.

But, as the law makes no difference in this respect, the plaintiff must be held to stand like any other assignee whose rights have been defeated by the dealings of the assignors, with a debtor who has no notice of the assignment.

The judgment must therefore be reversed and a new trial granted, with costs to abide the event.

[MONROE GENERAL TERM, September 8, 1860. *Smith, Knox and Johnson, Justices.*]

AYRAULT and CONE vs. A. McQUEEN.

Where a note, made by McQ. and indorsed by the defendant for the sole benefit and accommodation of the maker, to enable him to take up a previous note also indorsed by the defendant, was diverted from the purpose for which it was made and indorsed, without the knowledge or consent of the indorser, and transferred to the plaintiffs as security for a precedent debt, the plaintiffs at the same time surrendering to McQ. a security held by them amply sufficient to pay the amount of their previous debt against McQ.; *Held* that this surrender constituted the plaintiffs bona fide holders of the note, for value, and that they were entitled to recover the amount, of the endorser, notwithstanding the diversion.

THIS was an action on a promissory note for \$3000, dated August 31st, 1857, made by John McQueen and indorsed by the defendant, payable sixty days from date, at the Albany City Bank. The defendant was an accommodation indorser, and the defense set up was that the note was indorsed for a specific purpose, and was diverted by the maker and transferred to the plaintiff as security for a precedent debt, and

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therefore that the plaintiffs were not bona fide holders of the note. The facts, as they appear from the case, are substantially as follows: John McQueen, the maker of the note, was a manufacturer of flour, having a flouring mill at Avon, in the county of Livingston. Prior to the transfer of the note in suit to the plaintiff, John McQueen had procured a note of like amount to be discounted for him by the Genesee County Bank, which note the defendant had indorsed for the accommodation of John McQueen. A short time before the maturity of that note, John McQueen applied to the defendant to indorse another note to take up or renew the note so discounted at the bank, and presented to him the note in suit, the date being left blank. The defendant indorsed the note to renew the note so discounted at the Genesee County Bank, previously indorsed by him, and for no other purpose. The bank refused to renew the note so discounted, and when it matured, the note was protested for non-payment, and the defendant was charged as indorser. Afterwards the note was sued, went into judgment, and was collected out of the property of the defendant. On the 7th day of September, 1857, and after the Genesee County Bank refused to renew the note discounted by it, John McQueen procured the plaintiffs to discount a draft on Carpenter & Cooley of New York for \$500. The draft was accompanied with a bill of lading and rail road receipt for a car load of flour, delivered and consigned to Carpenter & Cooley. The plaintiff gave John McQueen, as the proceeds of the draft, \$296.85 in money, and a draft on the State Bank in Albany for \$200. A short time after this transaction, and the same day, a telegraphic dispatch was received from New York stating that Carpenter & Cooley had failed. The plaintiffs had knowledge of the dispatch, and Cone immediately went in quest of John McQueen. He found him at his house, told him that the plaintiffs had received the intelligence that Carpenter & Cooley had failed, and that they (the plaintiffs) wanted to be secured for the money he had obtained of them. John McQueen immedi-

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ately thereupon handed back to Cone the draft of \$200 and \$141.50 in money, the balance of the money received having been paid out after the draft on C. & C. was discounted, and before Cone saw it. When John McQueen opened his pocket book to take out the draft and money, he saw the note in question, in the condition it was in when indorsed by the defendant. John McQueen handed the note to Cone and said, "Here, take this note and keep it till I hand you the money I have paid out." Cone took the note and subsequently filled up the blank with the date, 31st of August—the word August being written in at the time he got it. John McQueen immediately went to New York to reclaim the flour consigned to Cooley & Carpenter, arrested it at Piermont and consigned it to another house, and subsequently obtained the money for the flour, which was not paid to the plaintiffs. After McQueen returned from New York, he went to Cone and got the bill of lading that accompanied the \$500 draft discounted on the day the note was delivered to Cone. At the time McQueen got the bill of lading, nothing was said about this note. At the time the note was delivered to Cone, John McQueen was indebted to the plaintiffs for money loaned, and drafts discounted, before that time; the amount of the indebtedness, including the balance due on the draft last discounted, amounting to \$1056.55. The defendant had no knowledge of the disposition made of this note by McQueen, nor did he know that the plaintiffs held it until he received a letter from the plaintiff Cone, dated September 2, 1857, in which Cone stated the purpose for which the note was delivered to the plaintiff. The plaintiff demanded judgment for \$1056.55. The defendant insisted that the plaintiffs were not bona fide holders of the note, and that as it had been diverted by John McQueen from the purpose for which it was indorsed by the defendant, and without his knowledge or assent, the defendant was not liable for any part of the note, and requested the court so to charge the jury. The court declined so to charge; to which decision the defendant's coun-

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sel excepted. The court held and decided that under the evidence the plaintiffs were entitled to recover the sum of \$155.35 and interest, and directed the jury to find a verdict accordingly. The jury, under the direction of the court, rendered a verdict for the plaintiffs for \$170.64. The plaintiffs entered up a judgment on the verdict, and the defendant appealed from the judgment.

James Wood, jun., for the appellant.

Scott Lord, for the respondent.

By the Court, E. DARWIN SMITH, J. Confessedly the promissory note on which this action was brought, was made and indorsed for the sole benefit and accommodation of the maker, and was diverted from the purpose for which it was made and indorsed, without the knowledge or assent of the indorser. The defendant, therefore, is clearly not liable upon his indorsement, unless the plaintiffs are holders for value, and received the note in good faith in the ordinary course of business and without notice of the fraud. (*Wardell v. Howell*, 9 Wend. 170. *Rochester v. Taylor*, 23 Barb. 18. *Small v. Smith*, 1 Denio, 583.) The learned judge at the circuit put the case upon this ground, and the only question for our decision is whether the plaintiff brought himself within the rule defining a bona fide holder of negotiable paper. The note was transferred as security for the sum of \$200, lent by the plaintiff to John McQueen on the same day of the transfer, the same being part of the sum of \$500 then loaned. On the discount of the draft for this \$500, it appears that a bill of lading and rail road receipt for 105 barrels of flour were delivered to the plaintiff as security for the payment of such draft. This bill of lading and receipt bound the flour, and was subsequently surrendered by the plaintiff to John McQueen, to enable him to reclaim the flour then on its way to the city of New York, before it reached the hands of the

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insolvent consignee. This was effected by said McQueen, and the flour sent by him to other consignees and the proceeds appropriated to the use of McQueen. Here a security was surrendered by the plaintiffs, amply sufficient to pay the said sum of \$200 for which the note in suit was loaned to, and received by them. I cannot see why this did not make the plaintiffs bona fide holders of this note, to the extent of the amount remaining unpaid of this sum of \$200. For this amount the judge directed a verdict for the plaintiffs at the circuit.

It is true that the bill of lading was not given up by the plaintiff simultaneously with the delivery of the note, but it was done afterwards, and upon the faith of the security afforded by the note. The plaintiff testified that McQueen told him, when he applied to get the bill of lading, that "we were secure with the note." This, I think, brings the case within the rule relating to the transfer of such paper, and constitutes the plaintiffs bona fide holders of the note. I think the verdict was right, and the judgment should be affirmed.

Judgment affirmed.

[MONROE GENERAL TERM, September 3, 1860. *Smith, Johnson and Knox, Justices.*]

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WARNER vs. CHAPPELL.

Two negotiable promissory notes, for \$500 each, made by P., were indorsed by C. for his accommodation, to be used to take up an equal amount of other paper previously made by P. and also indorsed by C. for P.'s accommodation. The notes were dishonored, at maturity, and a suit being brought thereon, against all the parties, by the Rochester City Bank, the then holder thereof, the plaintiff, at the request of P. and for his benefit solely, paid to the attorney of the bank the whole amount of the notes, and thereupon received the notes from the attorney, with an assurance from the latter that he, the attorney, had authority from the bank to make the transfer. *Held,*

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that the plaintiff obtained a valid title to the notes by the purchase and transfer from the attorney of the bank, and could maintain an action thereon, against C.

Held also, that under the circumstances, it would be presumed that the authority to the attorney to transfer the notes was contained in a proper resolution of the board of directors of the bank, for that purpose duly passed.

Held further, that if there were an omission on the part of the directors of the bank to pass the requisite resolution to authorize the transfer, yet that the plaintiff, being a purchaser for the full value of the notes, and having paid the price, in cash, without notice of such omission, his title to the notes would be protected by the last clause of the 8th section of the title of the revised statutes which makes void all transfers of the property and effects of a moneyed corporation, exceeding \$1000, unless authorized by a resolution of the board of directors.

A PPEAL from a judgment entered at a special term, upon the report of a referee.

The action was brought by the holder of notes, against the indorser, who indorsed them in blank before due. The notes were made by J. F. Peck. The defendant claimed that he indorsed them for the accommodation of the maker, who paid, or procured them to be paid, for his benefit; and that the plaintiff received the notes with full knowledge that they had been paid by or on account of the maker. The following facts were found by the referee: That the notes, each for \$500, the one dated the 25th of August, 1857, payable to the order of Samuel Spencer, and payable at the Metropolitan Bank, New York, seventy days after its date, and the other payable to the order of said Spencer, at the same place, sixty-three days after date, and dated the 1st of September, 1857, were made, indorsed by said Spencer and the defendant, and that each of them was protested for non-payment, and the indorsers duly notified thereof, as in the complaint was stated and set forth. That the proceeds of said notes respectively were received by the defendant and applied in payment of other notes made and indorsed by the same parties, in the same manner. That the notes first mentioned were discounted by the Rochester City Bank, and after the protest aforesaid were placed by said bank in the hands of

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its attorney, by whom a suit thereon was commenced against all the parties thereto, on the 11th day of March, 1858, and the complaint and summons in said suit were served on the defendant on the 12th, and on Spencer and Peck on the 14th day of the same month last mentioned. That about the time of the commencement of said suit, the plaintiff was informed by Spencer and Peck that the defendant was indebted to Peck and ought to pay said notes, and had expressly agreed to pay them, when they were made; that if a friend to Spencer would purchase the notes and compel the defendant to pay them as he ought to do, when the latter sued for the money thus paid, he would be compelled to comply with his agreement. That the plaintiff, confiding in the representations thus made to him, applied to the attorney of said bank, and offered to purchase said notes, and the latter, after (as he stated as a witness in this cause) having obtained the authority of the bank, agreed to sell said notes to the plaintiff for the amount due upon them, for principal and interest, and costs of protesting the same. That it was expressly stipulated that the plaintiff was to have by said purchase all the title and interest of said bank in the notes. That in pursuance of said agreement, the amount above mentioned was paid to said attorney for the use of the bank, and the notes were then and there delivered to the agent of the plaintiff by the said attorney, he remarking, in answer to an inquiry of said agent, that no writing was necessary to vest the title to said notes in the plaintiff, as that would pass by their delivery. It was further proved that Peck at the same time paid the costs that had accrued in the bank suit, to said attorney. It was also proved that the plaintiff raised the money with which said notes were purchased, upon a joint note made for himself by the plaintiff and said Spencer, payable to the order of one Vary, whom the plaintiff procured to indorse it, and which was subsequently paid by the plaintiff. It was also proved that there was no agreement in writing, or otherwise, between Peck and Spencer, or either

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of them, and the plaintiff, to indemnify or secure him in any way for his advance of money in the purchase of said notes; nor was there any evidence, except as above mentioned, of any resolution of the directors of the bank, authorizing the transfer and sale of the notes to the plaintiff. The referee found as a conclusion of fact, from all the evidence, that the plaintiff purchased said notes in his own behalf, in good faith and for a full consideration. And as conclusions of law he found, 1. That the plaintiff acquired the title to said notes, subject only to the equities existing between the bank and the defendant at the time of the transfer. 2. That no resolution of the directors of said bank was necessary to give validity to the sale and transfer of the notes to the plaintiff for a full consideration, or if necessary, such resolution was, under the facts above stated, to be presumed. 3. That the plaintiff, as owner of said notes, had a right in this action to recover the amount thereof with interest from the time they respectively matured, with the costs of protest, of the defendant; that these items made an aggregate of one thousand ninety-eight dollars and ninety-three cents, at the date of the report, for which sum judgment was ordered to be entered.

Geo. F. Danforth, for the appellant.

D. G. Shuart, for the respondent.

By the Court, E. DARWIN SMITH, J. The referee, I think, decided this case correctly. The note, at the time of its transfer, was the property of the Rochester City Bank, and was past due and in suit. Chappell had no defense to it in the hands of the bank. But if he had, the transfer was necessarily subject to all his equities, and the defense might have been made in this suit. If the purchase of this note by the plaintiff was made with the funds of Peck, the note should be deemed paid, as Peck was the principal debtor and the

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defendant an accommodation indorser for him. But this defense is clearly not established. The plaintiff swears that after several renewals and shifts he paid the note from the original discount of which the money was obtained which was paid for the purchase of the note. There is no evidence that tends to establish that the money paid to Montgomery on the purchase of the note belonged to Peck. The money was obtained by the discount of a note made by the plaintiff and Spencer and indorsed by one Vary. Peck's name was not on the note. The arrangement for the purchase of the note was made at his instance and request, and by his procurement, but nothing more is made out by the evidence on this point than that the plaintiff was his friend, and was willing to do him a favor by purchasing this note and stopping the suit against Peck and Spencer. This transaction was not unlawful, though it appears unfriendly towards the defendant, who was a mere accommodation indorser for Peck. But the equities between these parties are not before us. All that we can pass upon is the question whether the note remains valid in the hands of the plaintiff. I think the referee rightly decided this question of fact, that the purchase by the plaintiff was not a payment by Peck. The only question that remains is whether the plaintiff acquired a valid title to the notes by the purchase of the same of Montgomery and the transfer thereof by him. I think there can be no doubt on this point, upon the evidence of Montgomery. He swears, without objection or exception that the evidence was by parol, that he got authority from the bank to make the transfer.

It must be presumed, under this testimony, if necessary, that such authority was contained in a proper resolution of the board of directors of the bank for that purpose duly passed. But if this be not so, and the transfer of these notes would otherwise be within the restriction of § 8 of art. 1st, title 2d, chap. 18 of the first part of the revised statutes, making void all transfers of the property and effects of a

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moneyed corporation exceeding \$1000, not authorized by a resolution of the board of directors of such bank, the last clause of the section, declaring that the said section shall not be construed to render void any conveyance, assignment or transfer in the hands of a purchaser for a valuable consideration and without notice, will protect the plaintiff's title to the notes. The plaintiff was a purchaser for the full value of the notes, and paid the price in cash, without notice of the omission of the bank to pass the requisite resolution to authorize such transfer. This portion of the section has been construed to mean that if the transferee or assignee, in such a case, had no notice of the want of authority of the officers of the corporation to make the transfer in question, (1 *Selden*, 356; 15 *N. Y. Rep.* 191, 192; 3 *Comst.* 290,) he was within the protection of this clause of the section. In the case of *Curtiss and others v. Leavitt*, (15 *N. Y. Rep.* 192,) Judge Paige says: "If the purchaser shows that he paid value for the property, and if there is no proof that he had any notice of the omission of the directors to pass a previous resolution, his conveyance will not be invalid. He can repose upon affirmative proof of a valuable consideration and the want of proof of notice. The obligation rests upon the party asserting his conveyance, to prove affirmatively that he had actual notice, or what is equivalent thereto, that there had been no previous resolution to authorize the execution of the conveyance." It seems to me quite clear that this case, in respect to the transfer of this note for cash and for the full value, is not within the policy, spirit and intent of the statute, independently of these authorities. The note is negotiable, and title to it passed by delivery. I do not see, therefore, why the plaintiff did not acquire a lawful title to the note, nor why he is not entitled to maintain this action. The judgment therefore, I think, should be affirmed.

Judgment affirmed.

[MONROE GENERAL TERM, September 3, 1860. *Smith, Johnson and Knox, Justices.*]

WEED *vs.* BIBBINS.

In an action for slander, the innuendo cannot enlarge the meaning of the words spoken beyond the averment of the intention by which the speaking of the words is introduced, where the words themselves are ambiguous, and do not necessarily impute crime.

Where a complaint, in an action for slander, alleged that the plaintiff was the widow of E. W., deceased, who died leaving considerable property, real and personal, which he bequeathed to the plaintiff and his infant son; that after her husband's death the plaintiff was delivered of a male child, who was the son of E. W., and his only heir and next of kin; that after the birth of such child, the defendant, intending to injure the plaintiff, &c., and to cause it to be believed that she, the plaintiff, had produced a false and pretended child and heir of E. W., charged her with having got a "bogus baby"—"a bogus baby to get W.'s property"—styling it "another Cunningham affair—another bogus baby—a sham to get W.'s property," &c.; thereby charging and intending, and meaning to charge the plaintiff with having been guilty of the crime of fraudulently producing an infant, and falsely pretending it to have been born of parents whose child would be entitled to a share of personal estate, and to inherit real estate, with the intention of intercepting the inheritance of such real estate, and the distribution of such personal property from the persons lawfully entitled thereto; *Held* that although the words spoken did not necessarily impute a crime, yet, when looked at and understood in the light of the introductory averment, and the innuendo, a criminal offense was clearly imputed to the plaintiff, by the defendant.

Held also, that evidence showing what was generally understood by "the Cunningham affair" was improperly admitted. That the question of the meaning of the language employed, and of the intention of the defendant in using it, was a question for the jury, upon the whole case, and not a matter to be established by the opinion or understanding of any witness, or number of witnesses.

Held further, that under an answer properly setting up the defense, in mitigation of damages, the defendant had a right to prove that at, and before, and after the time when, according to the natural laws, the said child was begotten, the physical state and condition of the plaintiff's husband was so prostrated, feeble and infirm as to deny to him the physical power and ability to beget a child.

APPPEAL from a judgment entered upon the verdict of a jury, after a trial at the circuit. The action was for slander. The complaint alleged that on the 20th day of December, 1849, the plaintiff was duly and lawfully married to Elihu Weed, of Weedsport, now deceased, and continued

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to be his lawful wedded wife from that time until the 6th day of February, 1859, when the said Elihu Weed departed this life, and since that time she has continued to be, and now is, the widow of the said Elihu Weed, deceased. That the said Elihu Weed and the plaintiff had neither of them ever been married to any other person, until they were so married to each other at the time aforesaid, and from that time until the time of the death of the said Elihu Weed, he and the plaintiff lived and cohabited together as husband and wife. That the said Elihu Weed was a man of considerable wealth, consisting of both real and personal property; and that in the month of June, 1858, he made, published and declared his last will and testament, in and by which he devised and bequeathed his property, both real and personal, to the plaintiff and the infant son of the said Elihu Weed, and the plaintiff, hereinafter mentioned, and appointed the plaintiff sole executrix of his said last will and testament, and died at the time aforesaid without having made any other will, or in any other manner revoked or annulled the same, or made any codicil or addition thereto; and that the plaintiff was informed and believed that there was other property, both real and personal, which had descended or would descend by inheritance to the heirs at law of the said Elihu Weed, deceased. The plaintiff further alleged that on the 31st day of January, 1858, she, the said plaintiff, was delivered of a male child, which was a son of the said Elihu Weed, and which said child was afterwards named Louis Elihu Weed, and he is now living, and is the only heir at law and next of kin of the said Elihu Weed, deceased, and he and the plaintiff are the sole devisees and legatees of the said Elihu Weed, deceased, in and by his said last will and testament. And the plaintiff further averred that she had always been a woman of good name, fame and reputation, up to the time of the speaking of the words hereinafter mentioned and set forth by the defendant. 1. That the said defendant, wickedly contriving and maliciously intending to injure

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the plaintiff in her good name, fame and reputation, and to have it understood and believed that she, the said plaintiff, was intending to produce an infant, and pretend that it was born of herself, and the said Elihu Weed, whose child would be entitled to a share of, and would inherit both real and personal estate, and in that manner intercept the inheritance of the said real estate and the distribution of said personal property from the lawful heirs of the said Elihu Weed, who would otherwise have been entitled thereto, and while the plaintiff was with child by the said Elihu Weed, and on or about the 1st day of January, 1858, the defendant, in the presence and hearing of divers persons, said to them, of and concerning the plaintiff, the following false and slanderous words, to wit: "She (the said plaintiff meaning) is playing up Mrs. Cunningham." "I guess she is going to try and get a bogus baby." "Mrs. Weed (the plaintiff meaning) is playing up Mrs. Cunningham, and dressing so as to make people believe she is in a family way." "She (the plaintiff meaning) will bring a child from somewhere else and claim it to be her's." "It is all a sham to get Weed's property." Thereby charging, and intending, and meaning to charge the plaintiff with attempting to produce a false and pretended child as one born of herself, and the said Elihu Weed, and a false and pretended heir of him, the said Elihu Weed, falsely pretending it to be a child of theirs, which would intercept the inheritance of real estate by, and the distribution of personal property to, the heirs of said Elihu Weed, and with feigning pregnancy, and thus attempting to commit the crime of producing a false and pretended heir as aforesaid, to the damage of the plaintiff of one thousand dollars.

2. And the plaintiff further alleged, that afterwards, to wit, on or about the tenth day of February, 1858, at Weedsport aforesaid, and after she had been delivered of a child as aforesaid, the lawful issue of herself and the said Elihu Weed, to wit, the said Lewis Elihu Weed, the said defendant wickedly contriving and maliciously intending to injure the said

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plaintiff in her good name, fame and credit, and to cause it to be believed that she, the said plaintiff, had produced a false and pretended child and heir of the said Elihu Weed, said, as the plaintiff is informed and believes, in the presence and hearing of and to divers good and worthy citizens, of and concerning the plaintiff, the following false and slanderous words: "Mrs. Weed (the plaintiff meaning) has got a bogus baby." "It (the said child, Louis Elihu Weed meaning,) is a bogus baby." "Mrs. Weed (the plaintiff meaning) has got a bogus baby to get Weed's property, but they will knock it higher than a kite." "It is another Cunningham affair—another bogus baby." "It is a sham to get Weed's property." Thereby charging, and intending, and meaning to charge the plaintiff with having been guilty of the crime of fraudulently producing an infant, and falsely pretending it to have been born of parents whose child would be entitled to a share of personal estate, and to inherit real estate, with the intention of intercepting the inheritance of such real estate, and the distribution of such personal property from the persons lawfully entitled thereto, to the damage of the plaintiff, &c.

Two other counts were withdrawn at the trial. In his answer the defendant admitted the marriage and cohabitation of the plaintiff with her husband; that Weed possessed considerable real and personal property; and that the plaintiff was delivered of a child, at or about the time stated in the complaint; but denied every other material allegation in the complaint. And with a view of explaining, mitigating and extenuating whatever upon the trial might be alleged or shown against the defendant under the complaint, the said defendant gave notice that he would aver and prove the following circumstances: The said Elihu Weed was, for the last three years of his life, of very infirm bodily health, and of imbecile mind, and pursuant to statute in such case provided, the defendant having for many years previously been his intimate friend, was duly appointed and qualified, and

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subsequently thereto acted as a committee of his person and estate; and as it was his duty to do, did take and feel a deep interest in the welfare of the said deceased, and in the preservation of his right, and in protecting him from imposition and abuse; that at, and before, and after the time, when according to the natural laws the said child was begotten, the physical state and condition of the said Elihu Weed was, to all human appearance, so prostrated, feeble and infirm, as to deny to him the physical power and ability to beget a child. That the conduct and character of the said plaintiff during the last fifteen years, up to the decease of the said Elihu, and up to the commencement of this action, was at no time beyond suspicion and reproach, and that in common with many good and worthy citizens of the community where the plaintiff and defendant lived during all that time, this defendant was induced by the actions and conduct of the said plaintiff, together with the circumstances and condition of the said Elihu Weed, to believe, and did believe without any malice towards the plaintiff, that the said child was not the child of the said Elihu Weed.

On the trial the plaintiff proved the uttering by the defendant of the words charged. The defendant offered to show, in mitigation of damages, the facts stated in his answer. The court excluded the evidence; and the jury found a verdict for the plaintiff for \$1000 damages.

Cox & Avery, for the appellant.

Wm. B. Mills, for the respondent.

By the Court, JOHNSON, J. The motion for a nonsuit was properly denied. The first count is open to the objection that the innuendo attempts to enlarge the meaning of the words spoken, beyond the averment introductory to the speaking of the words. The introductory averment is, that the defendant, contriving and intending to have it understood

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and believed that the plaintiff was *intending* to produce an infant, and *pretend* that it was born of herself. The innuendo is, that the defendant meant, and intended, by the speaking of the words, to charge the plaintiff with *attempting* to produce a false and pretended child, as one born of herself and the said Elihu Weed, &c. It is well settled that the innuendo cannot enlarge the meaning of words spoken, beyond the averment of the intention by which the speaking of "the words is introduced, where the words themselves are ambiguous and do not necessarily impute crime." The mere intention to commit a crime, without an attempt by some overt act, is no offense; and had there been no other count, it would seem, by the rules of pleading, that no cause of action would have been alleged, and the nonsuit should have been granted, as no amendment was asked for or allowed. (*Dias v. Short*, 16 *How. Pr. R.* 322.)

But the second count is open to no such criticism. In that count the introductory averment and the innuendo are alike, and although the words spoken do not necessarily impute a crime, yet when looked at and understood in the light of the introductory averment and the innuendo, a criminal offense is clearly imputed to the plaintiff by the defendant. "The use of an averment," says Van Ness, J., in *Van Vechten v. Hopkins*, (5 *John.* 211,) "is to ascertain that to the court which is generally or doubtfully expressed; so that the court may not be perplexed of whom, or of what, it ought to be understood; and to add matter to the plea to make doubtful things clear." Here the defendant's meaning in using the otherwise doubtful words is made clear to the court by the introductory averment; especially in view of the extraneous fact alleged, to wit, the birth of the plaintiff's child.

But the evidence showing what was generally understood by "the Cunningham affair," was improperly admitted. The question of the meaning of the language employed, and of the intention of the defendant in using it, was a question

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for the jury, upon the whole case, and not a matter to be established by the opinion or understanding of any witness, or number of witnesses. (*Van Vechten v. Hopkins, supra. Gibson v. Williams, 4 Wend. 320. Maynard v. Beardsley, 7 id. 560. Dias v. Short, supra.*)

I am of opinion, also, that the evidence offered by the defendant, under the second answer, was improperly excluded. Under the decision of the court of appeals in the case of *Bush v. Prosser*, (1 *Kern. 347*,) it seems to me that evidence of the apparent and actual physical condition of Weed, the plaintiff's husband, for a year and more previous to the birth of the child, was clearly competent for the purpose for which it was pleaded and offered. It was pleaded in mitigation of damages, and the evidence was offered for that purpose. Had the fact set up in the answer been proved, the obvious tendency of the evidence would have been to disprove, to a certain extent, malice on the part of the defendant, and to establish grounds for a sincere belief in his mind, that any issue springing from the marriage was impossible, and the alleged pregnancy and birth were pretence. It was offered as a partial defense only, bearing upon the question of damages. I think it falls exactly within the principle established in *Bush v. Prosser*, and that the evidence should have been received. What weight it was entitled to, and what influence it should have, upon the measure of damages, were questions for the jury to determine. It follows that there must be a new trial, with costs to abide the event.

[MONROE GENERAL TERM, September 8, 1860. *Smith, Knox and Johnson, Justices.*]

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BLISS and others *vs.* COTTLE.

In an action to recover the possession of goods alleged to have been obtained fraudulently, the plaintiff may declare generally, claiming the property as his, and give the special facts in evidence, on the trial, to establish the fraud.

Where a purchase of goods is effected by means of fraudulent representations, the sale being upon credit and the property absolutely delivered, the contract of sale is merely voidable, and passes the title, which remains in the purchaser, until the vendor elects to disaffirm it, as he has the right to do, within a reasonable time after the discovery of the fraud, while the property remains in the hands of the purchaser, or at any time before it has passed to a bona fide purchaser.

The assignee of the fraudulent vendee, under an assignment for the benefit of creditors, stands in the place of his assignor, and has no higher right of property than the latter.

In case of an assignment by the fraudulent vendee, it is sufficient for the vendor to give notice to the assignee, of the fraud and of his claim or election to rescind the contract, and to demand the goods of him.

Where there is no pretence that the assignee was a party to, or cognizant of, the fraud, he is not bound to give up the goods until he has been required to do so by the vendor, upon a distinct demand, with notice of an explicit assertion of his claim that the goods were obtained by fraud.

Such demand must be made by the vendor in person or by some one duly authorized by the vendor to make it. A subsequent ratification, by the vendor, of an unauthorized demand made by a person assuming to act on his behalf, will not be sufficient to avoid the sale, and to entitle the vendor to sue for the conversion of the goods.

APPEAL from a judgment entered upon the report of a referee. The action was brought against the defendant to recover the value of certain parcels of dry goods, sold by the plaintiffs to one Fay, upon his fraudulent representations as to his pecuniary ability and circumstances. The goods were sold at various dates, from September 23 to October 19, 1857, amounting in all to \$2014.65. Three other parcels of goods had been purchased of them, in respect to which no fraud was pretended or found, amounting to \$486.80.

On the 25th December, 1857, Fay made an assignment of his property to the defendant, in trust for the benefit of creditors, who under it took possession of the property and pro-

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ceeded in discharge of the trusts. On the 19th January, 1858, one Cooper, a clerk of the plaintiffs, returning from the western states, casually passing through Canandaigua, stopped over a day, and learning of the assignment, demanded of the defendant "the goods bought of Bliss & Co." No original authority from the plaintiffs to Cooper, to rescind these contracts or make this demand, was pretended or proved. The defendant neglected to comply; and the next day this action was brought, for a *conversion*. The cause was referred to a sole referee, who at the trial allowed Cooper to give his opinion as to what amount of goods bought of the plaintiffs were on hand at the time of the demand, he having seen them in Fay's store at the time, without distinguishing between the different purchases. The witness stated that his belief was that of the sum total of the goods purchased of the plaintiffs, at least two-thirds were there. The fraudulent representations alleged in the complaint were found by the referee to have been made, as alleged. Amount of the fraudulent purchases, as per report, \$2014.65, two-thirds of which is \$1343.10, for which, with interest, judgment was entered, and the defendant appealed.

J. R. Cox, for the appellant.

J. C. Smith, for the plaintiff.

By the Court, E. DARWIN SMITH, J. Upon the chief question of fact tried before the referee in this action no point is made, here. That the goods for which this action was brought were obtained from the plaintiffs by false representations, must therefore be assumed as true. The plaintiffs' right to declare generally, claiming the property as theirs and give the special facts in evidence on the trial to establish the fraud, is, I think, undoubted. It is so held expressly in *Hunter v. Hudson River Iron Company*, (20 Barb. 493,) which on this point we think was rightly decided.

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The questions chiefly discussed on the argument relate to the absence of authority on the part of the person making the demand of the property, and asserting the right to rescind the contract on the part of the plaintiff. Nothing having been received by the plaintiffs on the sale, or afterwards, towards the purchase of the goods in question, they had nothing to restore on the rescission of the contract. All that was necessary to do to entitle them to reclaim their property was distinctly to assert the right to rescind the contract for the fraud, and to demand the goods. The sale being upon credit and the property absolutely delivered, the contract of sale was merely voidable, and passed the title, which remained in the vendee till the plaintiffs elected to *disaffirm* it, as they had a right to do, within a reasonable time after the discovery of the fraud, while it remained in the hands of the vendee or at any time before it had passed to a bona fide purchaser, as we have recently held in the case of *Stevens v. Hyde*,^(a) where I took occasion to examine the cases on this subject with considerable care, and to which case I refer. The rule in such cases is well stated by Judge Beardsley, in *Masson v. Bovet*, (1 *Denio*, 73,) as follows: "A person who is induced to part with his property on a fraudulent contract may, on discovering the fraud, avoid the contract and claim a return of what he has advanced upon it. But if the party defrauded would *disaffirm* the contract, he must do so at the earliest moment after discovering the cheat. That is the time to make his *election*, and it must be done promptly and unreservedly. The election is with him; he may *affirm* or *disaffirm* the contract." Chancellor Walworth states the rule in pretty much the same language in *Lloyd v. Brewster*, (4 *Paige*, 540,) and see also *Knowles v. Bigelow*, (12 *Pick.* 312.) The defendant being an assignee of the fraudulent vendee, stands in his place, and has no higher right of property. (*Griffin v. Marquardt*, 17 *N. Y. Rep.* 28.) It was suf-

(a) Ante, page 171.

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ficient, as we held in the case of *Stevens v. Hyde*, (*supra*,) for the plaintiffs to give notice to the assignee in such case, of the fraud and of their claim or election to rescind the contract and to demand the property of him. The defrauded vendor must have the right, in such case, to follow his property and to reclaim it in whose hands soever he may find it, on a proper notice of the fraud and a demand thereof, at any time before it has gone into the hands of a bona fide purchaser. Assuming, therefore, that the plaintiff had the clear right to disaffirm the sale to Fay & Co., and reclaim the goods in the hands of the defendant, the question remains, have the plaintiffs done what was essential in the assertion of such right to entitle them to maintain this action for the goods? The goods having been delivered by the plaintiffs to Fay & Co., and by Fay & Co. to the defendant, the possession of the defendant was not *tortious* but lawful. The defendant had also a naked title, but a title voidable or defeasible at the election of the plaintiffs. Until such election was made, the plaintiffs had no right of action against the defendant, and the defendant was not liable for a conversion of the property. Before the defendant was bound to give up these goods, he should have been required to do so by the plaintiff, upon a distinct demand, with notice of an explicit assertion of his claim that the goods were obtained by fraud; as there is no pretense in the case that the defendant was a party to or cognizant of the fraud. There is no proof in the case that the plaintiffs in person or by any direct act or declaration, in words or otherwise, ever elected to avoid the original sale to Fay & Co. There is no direct proof that they ever knew of the fraud, or ever claimed the right to reclaim the goods upon that or any other ground. The right to commence this action must have been complete and perfect when the suit was commenced, and it obviously cannot be maintained upon a demand or assertion of right involved simply and exclusively in the commencement of the action itself. Independently of the suit, the plaintiffs are bound to show their right to com-

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mence it when it was instituted. (7 Cowen, 739. 7 Barn. & Cress. 626. 14 Barb. 646.) They were bound to show a demand of the property with which it was unlawful on the part of the defendant to refuse to comply—a demand under circumstances which made the defendant's refusal a practical or actual conversion of the property. It appears, however, that the witness Cooper, assuming to act in behalf of the plaintiffs, made a claim to the property on the ground of the fraud, and demanded it of the defendant. The claim and demand made by Cooper, if properly authorized by the plaintiffs, was amply sufficient to avoid the sale and to entitle the plaintiffs to maintain this action. He distinctly informed the defendant that he claimed that the goods were fraudulently obtained of the plaintiffs, and at the same time demanded the delivery thereof. This was done on the 19th of January, 1858, and this suit was commenced on the next day. The complaint is not verified; but it must be presumed that the plaintiffs assented to the commencement of the suit, as it has since been prosecuted by them. The question then arises, whether the action can be maintained upon a subsequent *ratification* by the plaintiffs of the unauthorized demand thus made by Cooper assuming to act on their behalf. When Cooper asserted the right to reclaim the property, and demanded the delivery thereof to him, that act being unauthorized, the defendant clearly was not bound to comply with it. Delivery of the property to Cooper at that time, in compliance with such demand, would neither have bound the plaintiffs nor absolved J. W. Fay & Co. from their liability on the contract, to pay the price of the goods. If the goods had been delivered to Cooper, in compliance with his demand, and had been consumed by fire that night, or at any time before the plaintiffs had ratified the act, the loss would have fallen upon the defendant, and J. W. Fay & Co. would have had no defense to an action for the price. So it would have clearly been had Cooper received the goods and absconded with them, or otherwise have converted the same to his own use.

The general principle undoubtedly is that a subsequent ratification by the principal of an act for his benefit, done without authority, will have the same effect as an original authority to bind the principal, not only as regards the agent himself but in regard to third persons. (*Story on Agency*, § 244. *Paley on Agency*, by *Loyd*, 171, 172.) But there are some acts of unauthorized persons which cannot be ratified so as to give them validity as against third persons. Paley states the rule to be that, "When a demand or notice conveyed by an agent is intended to affect third persons with damages for non-compliance therewith, it is necessary that the agent should be duly authorized." Thus a notice to quit, by an unauthorized person, cannot be rendered valid to determine a lease by a subsequent ratification. (*Right on the demise of W. Fisher v. Cuthell*, 5 *East*, 49.) In this case Lord Ellenborough says, that "a ratification given afterwards will not do, because the tenant was entitled to such a notice as he could act upon with certainty." And Lawrence J, says: "The rule of law that '*omnis ratihabitio retro trahitur et mandato priori acqui paratur*,' seems only applicable to cases where the conduct of the parties on whom it is to operate cannot in the meantime depend upon whether there be a subsequent ratification." The same point was held in the same way in *Doe ex dem. Mann v. Waller*, (10 *Barn. & Cress.* 626.) In *Cole v. Ball*, (1 *Camp.* 478,) and *Corn v. Calary*, (1 *Esp.* 115,) it was held that a demand of a debt by an unauthorized person could not be ratified so as to take away a right to plead a prior tender, because the unauthorized person could not give a proper discharge of the debt. For the same reason a demand by a stranger, of goods, will not be evidence of a conversion. (*Paley by Dunlap*, 344. *Story on Agency*, § 247. *Solomon v. Daur*, 1 *Esp.* 83.) A demand of payment of a promissory note by a stranger is not good, though ratified, because the debtor is entitled to the note, or a discharge of the debt. (7 *Mass. R.* 483. *Bank of Utica v. Smith*, 18 *John.* 230.) If the property in this case con-

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fessedly belonged to the plaintiffs, and the defendant held it as a mere trustee, subject to the delivery upon request, then I think a sufficient demand would be established to sustain the action, within the cases of *Spencer v. Wilkes*, (9 *Alabama, Rep.* 744;) 29 *Miss. Rep.* 364; and *Watt v. Potter*, (2 *Mason*, 31.) But this is not such a case. A rescission or disaffirmance of the contract by the plaintiffs in person, or expressly authorized by them, should precede the demand of the property. Before such election to disaffirm, distinctly made and notified to the defendant, he could not be guilty of a conversion of the property. This view of the case superseded the necessity of examining the other points in controversy. I think the judgment should be reversed and a new trial granted.

New trial granted.

[MONROE GENERAL TERM, September 3, 1860. *Smith, Johnson and Knox*, Justices.]

JAMES WILSON vs. MARY L. WILSON and others.

T. W. died in 1812, leaving a will by which he devised all his lands to his son T. M. W. in fee, charged with the payment of his debts, with a provision for his wife, and with a legacy to another son, J. W. He also left a codicil to his will, which recited the devise in the will, and proceeded thus: "Now I do order that if my son T. M. W. shall decease without leaving any male issue, the real estate given to my son T. shall be disposed of as follows: and I do dispose thereof, that his widow and child shall have the use of one half of the real estate as long as she remains his widow, and after her death or marriage it shall be equally divided between my son J., my daughter E., and my son T. M. W.'s child, or children." When the testator died, he left surviving him his sons T. M. W. and J. W., and E. P. a daughter. T. M. W. entered under the devise, and continued in possession until his death. He died in 1824, without male issue, but leaving a widow, who died in 1857, and three daughters, M., A. and S., who are still living. E. P. also survived her brother T. M. W., and died in 1856, leaving a son, a daughter and the children of a third daughter. In June, 1812, after the death of T. W., (the

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testator,) E. P. executed and delivered a release and quitclaim to T. M. W. of all claim or right of claim which she then had, or which might thereafter arise to her or to her heirs or assigns to the real estate, by virtue of the codicil. On the 1st of July, 1823, T. M. W. mortgaged to J. W., the plaintiff, 24 acres, part of the land devised to him, to secure the payment of \$1561.25. On the 17th of February, 1825, after T. M. W.'s death, J. W. assigned this mortgage to M. The assignment contained no covenants, but it purported to assign, transfer and set over not only the mortgage but "the land and premises therein described."

- Held*, 1. That the testator contemplated the period of the death of T. M. W., as the time when the limitation over upon the event of failure of male issue of T. M. W. should take effect, and the estates limited upon such failure should vest successively.
2. That T. M. W., by the will and codicil, took a defeasible fee in the whole of the lands, and that upon his death without issue, and the death of his widow, the lands passed by executory devise to J. W., E. P., and the children of T. M. W. in fee, unless the share of E. P. had been previously conveyed by her release to T. M. W.
3. That the release executed by E. P. to T. M. W. was, within the case of *Miller v. Emans*, (19 N. Y. Rep. 384,) valid and effectual to pass to T. M. W. all her contingent right, so that it afterwards became a vested estate in the releasee.
4. That E. P., previous to the execution of the release, could have made a valid mortgage upon her contingent interest in the lands devised, and that her assignee T. M. W. was equally competent to execute such an instrument. Accordingly *held*, that the mortgage executed by T. M. W. to J. W. was a lien, not only on his own estate under the codicil, in all the lands described, which determined at his death, but also upon the fee in one-third of those lands, which his children took as heirs to their father, through the release of E. P.
5. That J. W. having assigned, without qualification, a mortgage which described the premises generally or the estate of the mortgagor as if he owned the whole, was not at liberty to assert that he, the assignor, was the owner of a share of the lands not subject to the mortgage, but was bound to make the mortgage good out of his own share of the property.

A PPEAL from a judgment entered at a special term, upon the report of a referee, in an action for the partition of real estate.

By the Court, EMOTT, J. This action was brought for the partition of a farm of land in the county of Westchester. It comes to us by separate appeals by the plaintiff and several

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of the defendants, from different portions of the judgment, which was rendered at special term upon the report of a referee, who had been directed to take proof of the title, and of the other matters stated in the pleadings.

The referee reported both his conclusions of fact and the evidence taken before him, and this evidence is a part of the case upon which the appeals were argued. There were some questions of fact raised and discussed at the argument, and I have examined the pleadings and proofs with reference to these, as well as the other points in the case. It may perhaps admit of some doubt whether we can consider these questions, or the correctness of the conclusions of the referee, or the court at special term, as far as they were purely conclusions of fact. But waiving any such difficulty, if there be any, I am satisfied with the results attained in these particulars in the court below, and I shall assume and will proceed to state the facts as I understand them to be, and to have been found at the trial.

1. The lands in question were owned by Thomas Wilson, who died in June, 1812, leaving a will made on the 28th day of April in that year, by which he devised all his lands to his son Thomas M. Wilson in fee, charged with the payment of his debts, with a provision for his wife, and with a legacy to another son James Wilson; but also leaving a codicil to this will, made on the 2d day of May, 1812. This codicil recites the devise in the will and proceeds: "Now I do order that if my son Thomas M. Wilson shall decease without leaving any male issue, the real estate given to my son Thomas shall be disposed of as follows: and I do dispose thereof, that his widow and child shall have the use of one half of the real estate as long as she remains his widow, and after her death or marriage it shall be equally divided between my son James, my daughter Elizabeth, and my son Thomas M. Wilson's child or children." When the testator Thomas Wilson died, he left surviving him his sons Thomas M. Wilson, and James Wilson who is the plaintiff in this action, and a daughter,

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Elizabeth Park. Thomas M. Wilson entered under the devise and continued in possession of the lands until his death. He died in 1824 without male issue, but leaving a widow who died in 1857, and three daughters, Mary L. Wilson, Ann Elizabeth Wilson and Sarah S. Reynolds, who are still living and are made defendants to this action. Elizabeth Park also survived her brother Thomas M. Wilson, and died in 1856, leaving a son, a daughter and the children of a third daughter, all of whom are parties to the suit.

The first question in the cause arises out of these facts. It is what estate Thomas M. Wilson took under the codicil, and what are the rights of the parties to this action representing the devisees named in the codicil, in consequence.

2. It farther appears that in June, 1812, after the death of the testator Thomas Wilson, Elizabeth Park executed and delivered a release and quitclaim to Thomas M. Wilson of all claim or right of claim which she then had, or which might thereafter arise to her or to her heirs or assigns, to the real estate in question by virtue of the codicil. Upon this a question is raised whether this instrument was effectual to pass any, and what estate to the releasee.

3. It farther appears that on the 1st day of July, 1823, Thomas M. Wilson mortgaged to James Wilson, the present plaintiff, 24 acres, part of the land now in question, to secure the payment of \$1561.25, which mortgage was duly recorded. On the 17th of February, 1825, after Thomas M. Wilson's death, James Wilson, in consideration of \$1525.71 paid to him by Richard Mead, assigned this indenture of mortgage to said Mead. The assignment contained no covenants, but it purported to assign, transfer and set over not only the mortgage but "the land and premises therein described." Richard Mead is dead, and his administrator Thomas A. Wilson is made a defendant, and asserts and asks payment of this mortgage. Whether it can be enforced against any interest or estate of either of the parties to the action, is the other principal question before us. I will proceed to consider

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these three questions. There are some other points of controversy of a minor character to which it may be necessary to allude.

It is well settled that the words "die without issue," and "die without leaving issue," in a devise of real estate, import an indefinite failure of issue, and not the failure of issue at the death of the first taker.

It has sometimes been attempted to make a distinction between the words "without issue," and "without leaving issue," but the attempt has not been successful. (*See Duentry v. Duentry*, 6 T. R. 307; *Tenny v. Agar*, 12 East, 253; *Romilly v. James*, 6 Taunt. 263; and *Forth v. Chapman*, 1 P. Wms. 663.) The case of *Paterson v. Ellis* in the court of errors of this state, (11 Wend. 259,) asserts the doctrine broadly, and is conclusive against any distinction between "without issue" and "without leaving issue," as to their legal effect before the revised statutes, and Ch. J. Parsons declares the rule in the same way in *Ide v. Ide*, (5 Mass. R. 500.)

Since the statute De Donis, 13 Edw. 1, and the statute of wills, a devise to a man and if he die without issue, or without leaving issue, then over, gave the first devisee an estate tail, with a contingent remainder upon the determination of the first estate by the failure of issue in tail at any period.

The act of the legislature of this state of February 22, 1786, abolished estates tail, and declared that in all cases when any person would but for the act become seised of lands in fee tail, he should be adjudged to be seised in fee simple absolute. The effect of this was to cut off contingent remainders limited upon failure of issue after an estate tail, since they could not be limited upon a fee simple, which exhausts the entire estate. A limitation of lands upon failure of issue of the first taker, imported an indefinite failure of issue, as has been already stated, and therefore such a limitation could not be supported as an executory devise, because it would not necessarily vest within the period beyond which such an estate could not extend at common law, viz. a life or lives in

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being and twenty-one years and nine months afterwards. The result was, that since the statute of 1786 a limitation of a future contingent estate upon failure of issue was void, both as a contingent remainder and an executory devise, and the first devisee took the whole estate.

These propositions do not require authorities to sustain them. Besides the cases which have been referred to, and the older English authorities, which are cited in them, it is sufficient to mention *Jackson v. Bellinger*, (18 John. 368,) and the first two series of cases upon the Eden will, which are or ought to be familiar to every lawyer, and some of which I shall presently refer to for another purpose. (*Anderson v. Jackson*, 16 John. 332. *Lion v. Burtiss*, 20 id. 483. *Wilkes v. Lion*, 2 Cowen, 333. See also *Fosdick v. Cornell*, 1 John. 440; *Jackson v. Staats*, 11 id. 337; *Jackson v. Thompson*, 6 Cowen, 178; *Paterson v. Ellis*, 11 Wend. 259; *Cutter v. Doughty*, 23 id. 513; *Lott v. Wyckoff*, 2 Comst. 355.) The construction which was given to the words dying without issue, in wills, obviously in many cases defeated the intention of the testator, and it is doubtful if these words were often used by any uninstructed person with a sense of their true legal import and effect. Courts and judges have therefore been astute to find and prompt to seize any reason in such instruments for applying a different construction, and for holding that the testator not only intended but legally manifested his intention, that the devise over should take effect upon the death of the first taker. Since the case of *Fosdick v. Cornell*, (1 John. 440,) it must be said to have been determined in this state, that where there was a devise to two or more, and upon the death of either without issue, then to the survivor or survivors, the mention of survivors and the devise over to surviving devisees, were sufficient to show that the testator intended a definite failure of issue, that is at the death of the first devisee, and to make an exception to the rule by which the meaning of the words "dying without issue" is settled. A devise to surviving devisees

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upon the death of the first devisee without issue, was therefore a good executory devise upon a qualified or determinable fee. This doctrine was applied by the supreme court to the will of Medcef Eden, in the case of *Anderson v. Jackson*, and it was affirmed by the court of errors in that case, notwithstanding the very able opinion of Chancellor Kent to the contrary. (16 *John*. 382, 397.) That learned jurist afterwards repeatedly expressed his disapprobation of this decision, but the courts adhered to it notwithstanding, and it has long been too well established to be overturned, at least by this court. The case of *Fosdick v. Cornell* was approved and followed in *Jackson v. Staats*, (11 *John*. 337,) and that of *Anderson v. Jackson* was followed in the other Eden cases, and was deliberately reaffirmed in the court of errors, in *Wilkes v. Lion*, (2 *Cowen*, 333.) In *Cutter v. Doughty*, (23 *Wend*. 513,) Judge Cowen says: "It is too late to contend that a devise to the survivor or survivors of another upon his death without issue is void as a limitation upon an indefinite failure of issue. The word survivors qualifies the technical or primary meaning of the words dying without issue, being considered the same as if the testator had added living at the time of his death."

In the case before us, the devise is to the effect that if Thomas M. Wilson the first devisee should die without leaving male issue, the lands are to go the one half to his widow during her life or widowhood, and upon her death or marriage the real estate shall be equally divided between James, Elizabeth and the children of Thomas. It is contended that this case differs from those which have been cited and is not controlled by the Eden cases, because the devise here is not expressed in the same terms, and is not to survivors, and because a portion of it at least is to persons who might come into being after the will took effect—the children of Thomas M. Wilson. This however is a difference in terms and not in principle, and cannot change the construction, or the result. The word "survivors" is not insisted upon in the cases as a

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technical word, which is to change the meaning of the limitation. Any language which indicates the time when the limitation is to take effect is sufficient. The rule which affixed a certain meaning to the words "dying without issue" was a rule of property, and it was steadily adhered to as such. But it could be controlled by a contrary intention properly manifested by a testator, and all that is sought is legal evidence of such intention. In the leading case of *Fosdick v. Cornell* the court argued the intention of the testator from the whole will, and the use of the word survivors was only mentioned as one circumstance. In *Jackson v. Beltinger*, (18 John. 380,) the observations of Ch. J. Spencer are very pertinent to show the reason of the decisions, and in *Lion v. Burtiss*, (20 John. R. 483,) the same judge is equally explicit. He says there, that since our statute, any expression denoting an intention to limit the failure of issue to a life in being, is sufficient to repel the implication that a limitation of an estate over in the event of the first devisee dying without issue, was meant to be an estate tail.

Nor is it the fact merely that the devise over is to persons who are in fact in esse, which is the controlling circumstance. That fact is material, because it shows that the devise must have been intended to take effect upon the death of the first devisee. This is the necessary feature, and it is sufficient to discover any clear evidence of this in the will.

In the present case there is a devise upon the death of Thomas M. Wilson without male issue, of one half the lands to his widow for life or widowhood, and upon the termination of this estate the ulterior devises are to vest in possession. It is obvious that the testator contemplated the period of the death of Thomas M. Wilson as the period when the limitation over should take effect. Here is a life estate limited to a person in esse, upon the failure of issue of the first devisee, and a subsequent division of the property directed at the termination of the life estate. Without indulging in conjecture, and without going beyond the language of the will, the

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inference is plain that the testator intended that the estates limited upon failure of male issue of Thomas M. Wilson should vest successively at the death of Thomas.

Another question argued was whether the devise over was of the whole or only of half the estate. The language of the codicil is, "upon her death or marriage it shall be equally divided," &c., and the heirs of Thomas M. Wilson contend that the codicil only revoked the will as to half the estate, and that Thomas M. took an absolute fee by the will, in the residue. I think, however, that the testator manifestly intended to revoke the whole devise, and to give all the property one direction when he made the codicil. He disposes of the whole of it, or intends to do so, by the language first used in the latter instrument; and the word "it" must be construed by that intention, and in reference to the property described in the prior part of the clause, and is not to be restricted to the one half given to the widow of Thomas for life. This is the construction approved by Judge Woodworth when this will was before this court, (8 *Cowen*, 86.) Although perhaps the point was not involved in the decision of that cause, the observations of the judge are pertinent and satisfactory.

I conclude, therefore, that Thomas M. Wilson by the will and codicil of his father took a defeasible fee in the whole of these lands, and that upon his death without issue, and the death of his widow, the lands passed by executory devise to James Wilson, Elizabeth Park and the children of Thomas M. Wilson in fee, unless the share of Mrs. Park had been previously conveyed by her release, which is the next question in the case.

The children of Mrs. Park deny the existence of the release which their mother is alleged to have executed. But I concur with the referee and the judge at special term, that it is sufficiently proved to have been made, and to have had all the incidents necessary to such a paper. As to the consideration, which is also disputed, the observations of Judge Lott

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appear to me conclusive. It is the most reasonable and natural explanation of the transaction, that Thomas M. Wilson refused to accept the devise and pay off the charges, and in particular the debt of his father to the husband of Mrs. Park, unless she would release her contingent interest in the property to him. As to fraud or imposition in procuring this instrument, if that issue were raised, there certainly is not enough in the evidence to justify a court in setting aside such a solemn and deliberate act.

When the release was executed, Thomas M. Wilson was in possession of the lands under his father's will and codicil, by which he took a determinable fee. The execution of the release may have been a part of one transaction with the acceptance of the devise, that is, the one a condition of the other, as has been already intimated, but, in legal contemplation, one preceded the other. Mrs. Park had in the land a possibility that title might vest in her, in the contingency of the death of her brother without male issue. The right was more than an expectancy as of an heir presumptive, for it depended only upon one contingency, and that not very remote, and could not be defeated by the volition of any other person.

The referee held that such a right could not pass by a release, upon the authority of the Eden cases, especially *Jackson v. Waldron*, (13 Wend. 178.) The judge at special term considered that the decision in that case was no longer the law, since the recent case of *Miller v. Emans*, in the court of appeals, (19 N. Y. R. 384.) Judge Selden in the opinion which he delivered in the latter case remarks, that the case before him may be distinguished from *Anderson v. Jackson*, (16 John. R. 382.) I confess I do not well see how, in any particular in which that case was material, or why these two cases should be distinguished, since the doctrine of *Anderson v. Jackson* is precisely that which was assumed on all hands, as the basis for the decision in *Miller v. Emans*, as to the character of the estates of the parties. I am inclined to

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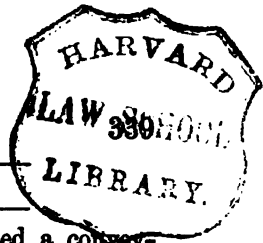
think that the learned judge meant to say that the case before him could be distinguished from *Jackson v. Waldron*, (13 Wend. 178.)

I apprehend the nature of the right attempted to be released or assigned, is the same in *Jackson v. Waldron* and in *Miller v. Emans*. In both there was an executory devise contingent upon survivorship, and the failure of issue. There is a difference in favor of the greater certainty, or the less remoteness of the contingency in the present case, because it does not depend upon survivorship, but upon the determination of the prior fee only. There is also a difference in the three cases in respect to the conveyances. In *Jackson v. Waldron* the conveyance was made by two persons who were entitled to determinable fees, with an executory devise to the survivor, and made to a third person. In some of the discussions upon this case it was asserted that Winter, the assignee or grantee, was in possession, or that he should be assumed to have been so in contemplation of law, when this release was made. The prevailing opinion in the court of errors discusses the case and denies the validity of the conveyance, on the assumption that it was made to a party in possession or entitled to a present estate. If it be assumed on the contrary that the conveyance in that case was made to a stranger, it would undoubtedly make a wide difference between that case and either *Miller v. Emans*, or the case before us, on the present point. Judge Strong, in his opinion says, that the case of *Jackson v. Waldron* did not raise the question whether one of the trustees could have released to the other, because the assignment was a conveyance to a stranger, not a release to one having a prior estate. But Judge Denio, in his dissenting opinion, very forcibly urges that Joseph Eden conveyed his determinable fee by the assignment to Winter, and Medcef could as well release to Winter, his brother's grantee, as to his brother.

In the case of *Miller v. Emans*, a certain number of several persons seised of an estate, which Judge Selden holds

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must be assimilated to a joint tenancy, executed a conveyance in the form of a release and quitclaim to their co-tenants, who were in actual possession, and this release was held to pass both their present estate and their future right.

In the case at bar one of three or more persons entitled to a contingent right upon the death of Thomas M. Wilson without male issue, released to Thomas M. Wilson while in possession and entitled to the precedent estate. This is a case certainly distinguishable from that which arose under the Eden title, if Judge Strong's construction of that case be correct. It is stronger in favor of the conveyance than that case, and I am unable to see any valid distinction in principle between it and the case of *Miller v. Emans*. The counsel for the heirs of Mrs. Park supposes that the release of the future estate, in the *Emans* case, was upheld by the court of appeals because it was between joint tenants. The argument, however, misapprehends the decision. The fact of a joint seisin and possession was material to the effect of the conveyance upon the present, and not the future estate. The release was held to operate upon the present estate of the grantor "per mitter l'estate." It contained no words to bring it within the statute of uses, and as it did not transfer the possession, it would have been inoperative upon the present estate unless made to a party in possession. The grantors were in possession of the whole premises, because they were seised "per my et per tout" as joint tenants. It did not appear that they were in the exclusive possession, or in possession otherwise than by their estate. So far as that conveyance passed a present estate, it was necessary to invoke this reasoning to support it. The validity of the conveyance depended upon the possession of the grantors, and that rested entirely upon their estate as joint tenants. But the release in the present case operated exclusively in another manner, that is, by way of enlargement. It is unnecessary to consider whether a release of one who has a future or contingent estate, would be valid if made to one who has a mere possession

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of the premises without title. Here the release is to one who has the entire and exclusive possession and present estate. Nor is it a question of a conveyance between two co-tenants, who are seised of several present estates, but of a release by one holding a future interest or right, to him who hath all the present right both of property and possession which could belong to any number of joint tenants. If this deed is otherwise sufficient, it is not open to any objection that it cannot operate by transmutation of possession, or under the statute of uses, because it is made to a person already in sole and rightful possession. Nor is there any difficulty with such a conveyance under the statute of champerty: that is abundantly clear from all the cases. The only question upon it would have been upon the nature of the interest to be affected and its releasability. I think this point is definitively settled in the case of *Miller v. Emans*, both by the judgment and the opinions. I have shown that the cases cannot be distinguished in principle on this point. I will only add two sentences from the opinion to show the length to which the judges who gave them were disposed to go. Judge Selden said, (p. 394,) "I think it will be found that any and every contingent right, however uncertain, may be released to a party already seised of a present estate in possession;" and Judge Strong said, (p. 307,) "When there is an existing right in one which cannot be defeated by the volition or action of another to a future estate upon a contingency, there is something upon which a release might operate." I add here that I think that this case could be distinguished from *Jackson v. Waldron*, and the validity of the release of Mrs. Park upheld by the doctrines of that decision, as it may be necessary for me to show in another part of the judgment. It is sufficient, however, at present, that it falls within *Miller v. Emans*.

I concur with my associate who heard this case at special term, that the release of Elizabeth Park was valid and effect-

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ual to pass to Thomas M. Wilson all her contingent right, so that it afterwards became a vested estate in him.

The third principal question in the case arises upon the mortgage made by Thomas M. Wilson to James Wilson. On the 26th day of June, 1823, Thomas M. Wilson, in order to pay or secure the payment of the two legacies given by the testator, and charged upon the lands which he took under the will and codicil, one of seven hundred and fifty dollars to the widow, and one of a like amount to James Wilson, executed a mortgage for \$1561.25 to James Wilson. This mortgage covered by its terms, twenty-four acres, part of the lands devised by the will of Thomas Wilson. At the time of the execution of the mortgage Thomas M. Wilson was seised of a determinable fee in the lands mortgaged, and that estate determined at his death. As the referee understood the law, this was his only interest or estate. But the release made by Mrs. Park being valid, Thomas M. Wilson had also the contingent interest of Elizabeth Park in the ultimate fee. That interest became vested in his heirs absolutely by the happening of the contingency upon which it depended. Thomas M. Wilson died on the 1st of September, 1824, and then of course his estate under his father's will determined. His children took as his heirs and not as purchasers, the fee of one third of the lands to which Mrs. Park would have been entitled but for her release. That interest in Thomas M. Wilson, after the release, was devisable and descendible. It must have been descendible, or the release would have been wholly ineffectual, and if descendible it was, I take it, devisable. In the opinion of Senator Tracy in *Jackson v. Waldron*, and by the authorities which he cites, it is shown that descendible and devisable are convertible terms in respect to contingent interests. The interest of Medcef Eden was not descendible, because his death would determine the very possibility which would direct the estate to him, and it would be absurd that he should be allowed to transmit through his death what his death put an end to. But the devise in the

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codicil of Thomas Wilson, sen., is otherwise in this respect. It is, I take it, beyond doubt, and not disputed by any of these parties, that the devise over upon the death of Thomas M. Wilson without male issue was of a fee. If the contingency happened and the estate vested, it became a fee, and before the happening of the contingency the expectant interest of the devisee, in respect to its qualities of transmission and transfer, assimilated a contingent remainder.

There is obviously a wide difference between the interest devised to Elizabeth Park by this codicil, and that which was considered in the court of errors in *Jackson v. Waldron*. Here the vesting of an estate in fee depended upon nothing but the contingency of the death of Thomas M. Wilson without male issue, and the persons in whom it was to vest were designated and ascertained. In the Eden will, on the contrary, the person who was to take was not ascertainable until the contingency happened. In other words, it depended upon the double contingency of the death of one of the brothers without issue, and the survivorship of the other. It was upon this very point that Senator Tracy held that the interest of Medcef Eden was a naked possibility not coupled with an interest. The whole point really decided in *Jackson v. Waldron* was that a devise to two, and if either died without issue, his share to the survivor, gave to each only a bare possibility in the lands devised to the other during his life, and that such a right was not an interest, and was not assignable nor releasable. The cases and text writers cited both by the Chancellor and Senator Tracy make a distinction between such a right, and those created by devises upon a like contingency to a definite and certain person. It is agreed that the latter are coupled with an interest, and it is well settled that they are devisable. This was determined in the case of *Roe v. Jones*, (1 H. Bl. 30; S. C. in error in B. R. 3 T. R. 88.) I am very clear that the right or interest of Elizabeth Park in these lands was devisable. We have held that it was releasable, and passed to Thomas M. Wilson by

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the release proved in this case, before he made the mortgage now in question. And it will be seen that as it was a possibility coupled with an interest, as being created by a devise to a designated person, and upon a single contingency not remote, or dependent upon the volition of another, the estate of Mrs. Park was a different one from that of Medcef Eden, and her release was valid under the distinction by which his was declared void.

But the question now is, whether this contingent interest or possibility coupled with an interest, could be bound or charged by a mortgage, that is, substantially whether it was assignable, and this is a question not decided in any of the cases to which I have referred.

Senator Tracy asserts it to be the doctrine of the older cases that a contingent interest, though devisable, is not assignable, and that the more recent decisions do not trench upon that rule. The remark was not necessary in the decision of the cause, and I think, with deference, was hardly correct. The opinion or impression may no doubt be traced in a great degree to *Lampet's case*, (10 Rep. 46.) Lord Coke does say it was resolved in that case that an executory interest in a term, which was devised for life to one and then for the residue to another, was not assignable to a stranger. But what was adjudged in the case was that this interest in the latter was releasable to the tenant for life. With reference to the legal propositions beyond the point decided in the case, it will be remembered that executory devises had then but just been introduced into the law, and they were regarded by the older lawyers with a strictness which has since been relaxed. Without adverting to the whole series of decisions, it will be sufficient to cite a few of the more recent. In the case of *Jones v. Roe*, (3 T. R. 88, 93,) Lord Kenyon seems to have considered that it had come to be settled by degrees that such interests were descendible, releasable and assignable, and that the only question remaining was if they were devisable; which he expresses a determination to put at rest. So the

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other judges, who gave their opinions seriatim, thought that the case turned upon the statute of wills, and upon the question whether the language of the statute was broad enough to include the interest or estate in question. I think the modern authorities and the best text books will sustain the proposition that devisable and assignable are convertible terms in reference to contingent interests, and I see no reason why they should not be. In order to show that such contingent rights were devisable, it was only necessary to establish that they were interests and not merely possibilities. But when this was established it certainly proved that the devisee had something in the land; and if he had an actual, definite, although contingent interest, he could convey it by the same rule by which he could devise it, unless he was forbidden to do so by the statutes of champerty. I have no doubt that such a case is entirely excluded from the provision of all, even the older and more stringent statutes of champerty. Waiving the question whether a mortgage is forbidden by these statutes, the sale of a contingent interest to arise after a determinable fee, is not such a sale of a pretended right or title as the statutes of champerty aim to prevent. Such pretended titles are where one person claims lands of which another is in possession holding adversely. It is plain that there was no such adverse possession here. I perceive no difference between vested and contingent remainders or executory devises, in respect to champerty. In either case there is no possession by the remainderman or executory devisee, and in neither is there any possession adverse to him. In *Grant v. Townsend*, (2 *Hill*, 554,) it was held that a remainderman could convey while the tenant for life was in possession. That was a vested remainder, but the principle would have been the same if it had been contingent.

I am of the opinion that Mrs. Park could have made a valid mortgage upon her interest, and that her assignee, Thomas M. Wilson, was equally competent. It follows that the mortgage which was made by the latter was a lien, not

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only on his own estate under the codicil in all the lands described, which determined at his death, but also upon the fee in one third of those lands, which his children took as heirs to their father through the release of Mrs. Park. This being so, it seems to me that there is no occasion nor opportunity to invoke the law of estoppel against the plaintiff as assignor of this mortgage. The doctrine upon which his liability for the mortgage was made out in the court below, rested upon his having assigned as valid an instrument which had become wholly invalid and ineffectual by the death of the mortgagor, and which by its terms covered land of which the assignor had become the owner. But that was not the fact. James Wilson still held this mortgage against the original share or estate of Elizabeth Park. It was a valid lien upon the fee to that extent, and I see nothing by which James Wilson can be said to have guarantied that it was a lien upon any thing more, or to be estopped from denying that it was not. If James Wilson had been compelled to pay this mortgage, I apprehend he could have come round either in this action, or in a proper suit, upon the heirs of Thomas M. Wilson for compensation to the extent of the value of the share of Elizabeth Park, because they took this as heirs to their father, and not as purchasers or as heirs to Thomas Wilson, sen. But, in the present aspect of the case, I think the mortgage in question should be paid out of the share devised to Elizabeth Park, and now held by the daughters of Thomas M. Wilson, by virtue of Mrs. Park's release of the land described in the mortgage. If the proceeds of this should prove insufficient for the purpose, the holder of the mortgage should be at liberty to apply for any proper relief against the heirs of Thomas M. Wilson, who are liable for the debt of their father, not only to the extent of the land expressly mortgaged, but to the value of the interest in all the land devised which passed by the release of Elizabeth Park, and comes to them as heirs of Thomas M. Wilson.

The conclusion at which I have thus arrived disposes of

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the questions which were discussed as to the equities between James Wilson and Thomas M. Wilson's children.

There was another point raised in behalf of the defendants, Mary L. Wilson and others, that they should be repaid the expenditures made by their father in permanent improvements. It is sufficient to say that I do not find in the papers any evidence of these improvements, and we are not called upon to lay down any rule with respect to them.

My opinion therefore is, that there should be a modification of the judgment in relation to the mortgage of Thomas M. Wilson as I have already indicated, and that in other respects the judgment should be affirmed. But my brethren do not concur in this view of the effect of the assignment by James Wilson. They consider him bound to make the mortgage good out of his own share of this property, in consequence of his assignment, upon a similar principle to that which was acted upon by the referee, although applied to a different state of facts. In their view of the case, James Wilson, having assigned without qualification a mortgage which described the premises generally, or the estate of the mortgagor as if he owned the whole, is not at liberty to assert that he, the assignor, is the owner of a share of the lands not subject to the mortgage. I am not able, as I have said, to concur in this view of this part of the case, or in the consequences which are deduced from it. Upon the other points presented by the case the court are unanimous, and it being the opinion of a majority of the court that this portion of the judgment is also correct, the whole judgment is affirmed.

The costs of all the parties on the appeal will be paid out of the fund.

[ORANGE GENERAL TERM, September 10, 1860. *Lott, Emmet and Brown, Justices.*]

LAVERTY vs. MOORE and others.

In 1835 L. and G. entered into an agreement in writing, by which L. undertook to fill in with earth, &c., certain lands under water, owned by G., and as a compensation for the labor, G. covenanted to convey to L. one-third part of such lands, in fee. L. proceeded to fill in the lots, having previously made a survey of the same, in which he was aided by T., the then owner of the adjoining lots on the south. On such survey T. placed stakes, and made a monument, to indicate the boundary line between him and L., and L. filled in the lots to correspond with the stakes and monument. T. was repeatedly upon the ground, while the work was in progress, and made no objection thereto. *Held*, that the line between the two adjoining owners being thus established, and located by the acts and acquiescence of the parties themselves, and L. having expended money and labor in making valuable and permanent improvements upon the lots, in the faith and confidence that the line so marked was the true line, it must be regarded as such; and that persons claiming title under T. were estopped from controverting the line as thus established and located.

Where a bill of foreclosure stated that a portion of the mortgaged premises had been released from the operation of the mortgage, by the mortgagee, and that the mortgage was not a lien thereon; and the decree excepted that portion from the effect of the decree of foreclosure; but the master's deed, through inadvertence, embraced the whole mortgaged premises; it was *held*, that the premises released did not pass to the purchaser at the master's sale, and that the deed had no effect whatever upon the title of the true owner of the premises released.

L. entered into possession of lots, under an agreement in writing between him and G., by which it was stipulated that L. should fill in the same and other lots owned by G., and that in consideration thereof G. should, on the completion of the work, convey to L. one-third of the lands, in fee. L. caused his agreement with G. to be recorded in the county clerk's office, and continued in possession after the completion of the work. *Held*, that although the agreement was not a conveyance, within the meaning of the recording act, yet that it tended to show the character of L.'s possession; that such possession, under claim of title to a deed from G., was notice to subsequent mortgagees and others, of his interest and claim; and that the lien of a subsequent mortgage given by G. was subject to L.'s right to a deed, under his contract.

THIS was an appeal by the defendant from a judgment entered upon the report of a referee.

William Fullerton, for the plaintiff.

D. McMahon, for the defendants.

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By the Court, BROWN, J. This is an action to enforce the specific performance of a contract for the sale and conveyance of an interest in a lot of land in Williamsburgh, now the city of Brooklyn, and to be let into the possession thereof. The contract under which the plaintiff claims bears date February 9th, 1835, but no question is made upon the statute of limitations; nor do the defendants defend themselves upon the ground of bona fide purchase without notice. The right of the plaintiff to recover depends solely upon his equitable title to the premises claimed. The action was tried before William Kent, Esq., referee, who made a report in favor of the plaintiff, upon which he entered judgment, and the defendant appealed. I shall refer briefly to the three principal questions involved in the controversy.

The lands were originally below high water mark, and flowed by the tide waters of the East river. Francis Titus owned the lands upon the shore, with a bulkhead or wharf extending a short distance into the water. But it does not appear that he had any title from the state to the lands below high water mark as the waters flowed at the time of his conveyance, to which I shall refer. On the 10th of May, 1828, by his deed of that date, he conveyed a portion of his lands to one Noah Waterbury, in fee. This land was bounded upon the westerly side by the river, and included such right as he then had to the lands under the waters of the river. It was bounded, as I understand, on the north and south by lands of which Titus still remained the owner, being the residue of a large or very considerable farm of land; opposite this land was the bulkhead, which was in use, or had been used as a landing place. On the 5th of November, 1832, Noah Waterbury conveyed the same premises to James M. Halsey, who on the same day, by his deed, conveyed them to James Guild. By an act of the legislature of the state, passed April 22, 1835, James Guild and others were authorized to erect and maintain docks and wharves adjacent to the land owned by them in Williamsburgh, lying in the East

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river, and extending into the river to a line designated upon a map of the river, made in February, 1835, by D. Ewen, city surveyor, &c. Such docks and wharves were to extend along the front of their lands and be made firm and secure. It was in anticipation of this grant of the lands under water that James Guild, on the 9th of February, 1835, by articles of agreement of that date, duly executed under seal, entered into the contract with James Lavery, the plaintiff, which is the foundation of this action. By this contract Lavery undertook to fill in with earth and material the lands in controversy, "bounded therein northerly by the southerly side of North 6th street, to the East river; thence to and along a line drawn from the center of North 6th street where the same strikes the East river, said line following the direction of said street until it strikes and runs to the westerly side of the logs lying in the East river designed for a bulkhead; southerly by the line which divides the property formerly of James Guild and Francis Titus; westerly by the westerly side of the logs aforesaid; easterly said piece of ground runs to a point 134 feet westerly from First street, on the southerly line of North 6th street." The filling in was to be completed according to a profile, and of a height to correspond with the grade of North 6th street. As a compensation for the work, Guild covenanted to convey to Lavery in fee simple by deed, with covenant of warranty, the one-third part of such lands. In laying out North 6th street, a small gore or triangular shaped piece of Guild's land was left on the southerly side of the street. The base of this gore or triangle was the original high water mark, and was 5 feet 6 inches in length. The north or shortest of the two sides was the south side of North 6th street, and was 16 feet in length, and the hypotenuse or longest side was the old boundary line between Francis Titus and Noah Waterbury. The gore or triangular lot, one-third of which is awarded to the plaintiff by the referee, has a base of 81 feet 6 inches, with the hypotenuse 262 feet 10 inches in length, and the

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side along the south line of North 6th street 256 feet 6 inches in length. This enlargement of the area of the lot at the western end is obtained by projecting or continuing the old boundary line between Titus and Waterbury in the same course into the East river. The appellants claim that in running the line in this direction the referee committed an error; insisting that the whole of the old exterior line and the whole of the new exterior is to be ascertained and taken into consideration, in awarding to each proprietor his due share of the new water front. Upon this theory the southerly line of the lot in which the referee awarded the plaintiff a share should begin at the south end of the 5 feet 6 inches line—the base line of the gore, as originally left by the opening of North 6th street—and from thence run westerly on a line parallel with the south side of North 6th street to the new exterior line in the East river; thus making the lot 5 feet 6 inches in width from north to south, and 256 feet 6 inches from east to west. The real question in controversy upon this branch of the case, it is to be observed, is the question of the location of the south line of the lot. The referee has found some facts from the evidence which must have the effect to control the location, and to fix it irrevocably upon a line corresponding in its course and direction with the old boundary line between Titus and Waterbury. I refer to the following portion of his report: “That when Lavery commenced filling in the gore he made a survey of the same, in which he was aided by Francis Titus. That at such survey Titus placed stakes at the southerly side of the gore, as the same was then located and filled in by Lavery. He also cut what is called by the witnesses a crowfoot, in one of the old dock logs forming the old bulkhead, as a monument for the extreme southwesterly corner of the gore; which stakes and mark are shown by the map annexed to the report. That Lavery filled in the lot to correspond with the stakes and mark upon the old dock. That Titus was the owner of the land upon the southerly side of the gore at the time the

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survey was made and the work of filling in done, and was repeatedly upon the ground while the work was in progress, and made no objections thereto." Francis Titus died in 1837, leaving one child, Cornelia Phelps, wife of Simon Phelps, surviving him. The defendants, James Moore and William Leeds, now hold the land on the southerly side of the gore, directly or indirectly by lease from Phelps and wife. The legal inference is that their title is derived from Francis Titus. With these facts sustained by the proofs, the defendants are estopped from controverting the line as established and located by Frances Titus and James Lavery the plaintiff. We are not now to consider the rights of riparian owners to lands reclaimed from the waters of a navigable river under grants from the state; nor to say how the exterior lines are to be adjusted with reference to the lines upon the original river bank. The rights of the parties do not depend upon the application of this principle. The line in question must be regarded as settled by the acts and acquiescence of the owners upon both sides of the line. They surveyed and marked it out. Lavery expended his money and labor in making valuable and permanent improvements upon the lot, upon the faith and confidence that the line so marked was the true line. He reclaimed the lands from the tide water of the river, and by his improvements rendered them fit for occupation, and imparted to them if not all at least the principal part of their value. And it would be manifestly unjust to award them to another. The law will not lend its sanction to such an act.

On the 5th November, 1832, when James M. Halsey conveyed the lands to James Guild, the latter executed to the former his mortgage upon the same, to secure the payment of \$10,250, being a part of the purchase money. In May, 1837, Guild, by his deed of assignment, conveyed the premises purchased from Halsey to Edmund Frost and John Luther, by his deed of assignment, in trust for the payment of debts. On the 12th of August, 1837, Halsey, by his deed

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of release, executed to Frost and Luther, and for the consideration expressed therein of one dollar, released the gore of land in which Laverty had an interest from the lien of his mortgage, and agreed therein to look to the residue of the mortgaged premises for the payment of the money due thereon.

The legal representatives of Halsey afterwards foreclosed the mortgage by bill in the late court of chancery, and made Laverty a party defendant thereto. The bill of complaint stated the release of the gore, and that the mortgage was not a lien thereon. The decree of sale excepted the gore from the effect of the decree. At the sale, James M. Waterbury became the purchaser; and the deed which the master delivered to him in execution of the decree included the gore, with the residue of the mortgaged premises. Waterbury, on the 3d September, 1846, by his deed of that date, quitclaimed the gore to the heirs at law of Samuel Meeker, deceased, to wit: Martin R. Meeker, John F. Meeker, Sands C. Meeker, Maria Sandford, Sarah Ann Meeker, and Catherine Meeker, who are defendants herein. It requires no argument to show that the master's deed did not convey the gore in which Laverty had an interest. It could not convey premises which the bill of complaint did not claim, and of which the decree did not authorize or direct a sale. It was an inadvertence on the part of the master in not having his deed follow the decree, and had no effect whatever upon the title of the true owner.

The remaining question arises upon the effect of the mortgage executed by Frost and Luther to James M. Halsey on the same day that he executed to them the release of the gore. This mortgage is made to secure the payment of \$1582, purporting to be the consideration money for the release, and conveys the gore as security therefor. The deed of assignment from Guild to Frost and Luther was upon the express trust to sell for the payment of debts, and their power to execute the mortgage is by no means free from doubt. But the question may be disposed of upon other grounds.

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On the 11th August, 1836, which was before the date of the deed of assignment to Frost and Luther, Lavery had caused his agreement with Guild to be recorded in the office of the clerk of the county of Kings, and although not a conveyance within the meaning of the recording act, tended to show the character of his possession. The referee finds, as a fact in the case, that the plaintiff was in possession of the gore, claiming an interest therein from the time of the completion of his contract to fill in the lot, sometime in the year 1836 or 1837, up to May, 1843, when a part of the premises were taken possession of by one Grahams Polley. In his own evidence, the plaintiff says, he went into possession about a year before he had the article of agreement with Guild. He commenced filling in a month before the article was dated, and it took him a year to complete the work. He kept possession until about a year after Polley drove his piles. Lavery's possession was notice to James M. Halsey and all others of his interest and claim to the gore of land, and the lien of the mortgage was subject to Lavery's right to a deed for one third part thereof, under his contract with James Guild. James M. Halsey assigned the mortgage to Samuel Meeker, who foreclosed the same by bill in the late court of chancery, filed November 16th, 1841, and under these proceedings Samuel Meeker himself became the purchaser and acquired the title under the master's deed. James Lavery was not made a party to these proceedings, although he was in the actual possession of the premises at the time, and is no way prejudiced or affected by them.

For these reasons I concur with the referee in his opinion, that the plaintiff is entitled to a conveyance in fee simple from the defendants for an undivided third part of the premises mentioned and referred to in the contract, and to be let into the possession thereof. The judgment should be affirmed with costs:

[ORANGE GENERAL TERM, September 10, 1860. *Lott, Emott and Brown, Justices.*]

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CURTIS, appellant, vs. STILWELL, executrix &c., respondent.

A surrogate cannot take cognizance of disputed claims against an estate, and adjudicate upon their validity or invalidity, but must refer them to the common law tribunals, for adjudication, before he can make a decree for their payment.

Where a creditor has obtained a judgment against his debtor, in the supreme court, and upon an appeal to the general term, an order denying a motion to set aside the judgment is subsequently made, and from that order an appeal is taken, by the executor of the defendant, after the death of the latter, to the court of appeals; the surrogate cannot, while such appeal is still pending and undetermined, entertain jurisdiction for the purpose of enforcing the payment of the judgment.

His proper course is to adjourn over the proceedings before him, and suspend the accounting and distribution during the pendency of the litigation in the court of appeals.

A PPEAL from an order made by the surrogate of the county of Kings.

G. C. Blanke, for the appellant.

Smith & Woodward, for the respondent.

By the Court, BROWN, J. On the 23d September, 1857, Jasper W. Gilbert recovered a judgment in this court against Sylvanus B. Stilwell, the respondent's testator, for the sum of \$7625.61, but how the judgment was obtained, and for what cause, does not appear, as the record was not produced and put in evidence at the hearing before the surrogate. An appeal was taken from the judgment to the general term for the second district, which made an order, in September, 1858, denying the motion made to set the judgment aside. From this order the respondent appealed to the court of appeals, upon the usual papers, where the action is still pending. Both these appeals were taken in the name of the respondent, so that the judgment must have been rendered shortly before the death of her testator. In the mean time Jasper W. Gilbert assigned the judgment to the appellant, who, in November, 1859, filed his petition with the surrogate of the county

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of Kings, setting out the recovery of the judgment, the granting of letters testamentary upon the will to the respondent, the filing of the inventory, and the lapse of eighteen months, and praying that proceedings might be had to enforce the payment of the judgment. The respondent answered the petition and rendered her account, denying therein that the appellant had any claim against the estate, and that the judgment had been removed to the court of appeals, by the respondent herein, where the same was still pending and undetermined. Several hearings were had before the surrogate, at which the facts to which I have referred appeared from the proceedings and proofs; and it also appeared that there were sufficient assets of the estate to pay the claim of the appellant, if it really existed, and was, as he claimed, entitled to a priority. The surrogate came to the conclusion, and so determined, that until the determination of the court of appeals in favor of the appellant herein by a judgment in his favor upon the merits, or the appeal was dismissed, he could make no decree for the payment of the claim. He did not assume to pass upon its validity. He neither rejected it nor did he make a decree for its payment by the respondent as a legal claim against the estate, but adjourned over the proceedings during the pendency of the litigation in the court of appeals. So that in fact the appellant's proceedings to enforce the payment of his claim are still pending and undetermined before the surrogate, ready to be called up and resumed whenever the judgment between the parties shall be rendered in the court of appeals.

This court has held that the surrogate has no jurisdiction, upon a final accounting, to make a decree for the payment of a claim which is disputed, and the obligation of the personal representative to pay it denied. It must first be established by the judgment of a court of common law, and the liability of the estate determined in that forum. (*Wilson v. The Baptist Education Society*, 10 Barb. 309. *Disosway*

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v. *Bank of Washington*, 24 *id.* 60. *Andrews v. Wallege*, 17 *Howard's Pr. Rep.* 263.)

This principle is not, I understand, disputed by the appellant, but he insists that such judgment has already been rendered in his favor. He certainly has the judgment of the general and special terms of this court to the effect that the claim is justly due. But this is not enough, in all cases; for if it were, executors and administrators would be deprived of the benefit of an appeal, and could not with any advantage take the opinion and judgment of the court of last resort in resisting the payment of pretended debts and claims which they had every reason to think illegal and unjust. The spirit of the authorities to which I have referred is that the surrogate cannot take cognizance of disputed claims, and adjudicate upon their validity or invalidity, but must refer them to the common law tribunals for adjudication, before he can make a decree for their payment. They are in disaffirmance and exclusion of his jurisdiction over such questions, and nothing more. An executor or administrator against whom a judgment is rendered has the same right of appeal as other persons. And while the appeal is pending the claim is in dispute, and not such as the surrogate has authority to allow as a just and an authenticated claim against the estate. A different rule would be subversive of the ends proposed to be accomplished by the limitation upon the surrogate's power. In addition to sections 35, 36 and 37 of the act in regard to the duties of executors and administrators, in the payment of debts and legacies, section 74 of the article which defines their duties in rendering an account and in making distribution to the next of kin, contains a provision that whenever it appears there is a claim against the estate, upon which a suit is then pending, the surrogate shall allow a sum sufficient to satisfy such claim, or the proportion of the estate to which it may be entitled, to be retained for the purpose of being applied to the payment of such claim when recovered, or of being distributed according to law. Such sum may be left in the

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hands of the executor or administrator, or deposited in some safe bank, as the surrogate may direct. This is a significant provision, and invests the surrogate with ample power, during the pendency of the litigation upon a disputed claim, to withdraw from the effects of the estate and deposit in some safe bank, or leave in the hands of the executor or administrator, in his discretion, a sum sufficient to pay such claim in the event of its being recovered against the estate. This term, recovered, employed by the statute, signifies that the obligation and duty of the executor or administrator to pay the demand from the effects of the estate, shall be fixed and established by law. In the present case the surrogate did not set apart a sum to pay the appellant's judgment and thus follow the literal direction of the act. But he did that which was quite as beneficial to the appellant. He suspended the accounting and distribution altogether, and adjourned over the proceedings to await the judgment and decision of the court of appeals upon the appellant's claim. This he had power to do, under section 64 of the act, which provides that he may adjourn the hearing upon the application, from time to time as shall be necessary.

But it is said that the appellant has no security for the payment of his claim. That the undertaking, on removing the action in which the judgment was rendered into the court of appeals, is not given under section 335, but under section 334 of the code, and does not secure the payment of the judgment, should it be affirmed upon appeal. It is to be observed in answer to this suggestion, that the omission to give such an undertaking upon the appeal as would have the effect to stay the issuing of an execution upon the judgment, deprives the appellant of no substantial right; because he was not in a situation to issue an execution upon the original judgment after the death of the respondent's testator. He has all the security for the payment of his debt that creditors of deceased debtors usually have. His judgment, if finally sustained, is entitled to a priority, and if the circumstances of the execu-

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trix are so precarious as to endanger the assets of the estate in her hands, he may apply to the surrogate for the relief provided by the article relating to the granting letters testamentary.

Having arrived at a conclusion adverse to the appellant, upon the principal question, I decline to consider his exceptions to the decisions of the surrogate, rejecting certain evidence offered by him in respect to the assets of the estate.

The order of the surrogate should be affirmed, with costs.

[ORANGE GENERAL TERM, September 10, 1860. *Lott, Emott and Brown, Justices.*]

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THE BROOKLYN CENTRAL RAIL ROAD COMPANY vs. THE
BROOKLYN CITY RAIL ROAD COMPANY.

THE BROOKLYN CITY RAIL ROAD COMPANY vs. THE BROOK-
LYN CENTRAL RAIL ROAD COMPANY.

Rights acquired under a statute which is, in its nature, a contract, and which does not reserve to the legislature the power of repeal, cannot be divested by subsequent legislation.

The resolution of the common council of the city of Brooklyn, of the 19th of December, 1853, by which it signified its assent to the construction of the rail road over the routes designated in the articles of association of the Brooklyn City Rail Road Company, upon the condition annexed thereto, was authorized by the 5th subdivision of the 28th section of the general rail road act, and therefore lawful; and the acceptance thereof, with the conditions annexed, by the rail road company, constituted a contract, which the company was bound to perform, and which the common council could not rescind, without adequate cause. *SCRUGHAM, J.* dissented.

The grant to the Brooklyn City Rail Road Company, and its acceptance upon the conditions annexed, with the duties and obligations and large expenditures resulting therefrom, invested the company with the right of property in the franchise, of which it could not be deprived without its consent, or against its will.

The Brooklyn and Jamaica Rail Road Company was incorporated by an act of the legislature, passed April 25th, 1832, with the right to construct a rail road, commencing at an eligible point within the village of Brooklyn,

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and extending to any point within the village of Jamaica, with lateral railways to the villages of Flatbush and Flushing. The grant was not to commence at several points, but at one point in Brooklyn. It was not to ramify itself through the several streets of the city, at any and at all times thereafter, but to run from the one point direct to another point in the village of Jamaica. The company accordingly located its western terminus at the foot of Atlantic street, Brooklyn, and its eastern in the village of Jamaica, where they had ever since remained. *Held*, that the company, having made its location, and adhered to it for many years, was concluded by what it had done; and that it had no franchise in Furman street, which it could assign to another company. SCRUGHAM, J. dissented.

A rail road company being authorized, by grant from the legislature, to construct and operate a rail road through the streets of a city, and the common council of the city having given its assent to the construction of the road by the company, upon the route designated in its charter, on certain conditions; *Held*, that the common council had no power, by resolution, to annul or impair the grant to the company on account of its failure to complete the road within the time limited by the conditions annexed to the assent of the common council. SCRUGHAM, J. dissented.

Held, also, that the condition to complete the road within a given time, was a condition subsequent; the franchise vesting in the grantee subject to be defeated by its omission to perform the condition. That the omission did not *ipso facto* determine the estate, but exposed it to be determined at the election of the grantor. But that nothing short of a judicial decision upon the question could deprive the grantee of the franchise, or impair its rights of property therein.

When a rail road has been laid down in a public street of a city, in pursuance of a grant from the legislature and the assent of the municipal authorities, it does not become a part of the street, so as to authorize the public at large, and other rail road corporations, with the consent of the common council, to use the road with the appropriate cars or carriages for the transit of passengers, in common with the owners of the franchise.

Any rule which would recognize the right of the public, and such other corporation as the municipal authorities might choose to license, to the indiscriminate use of a railway constructed in a public street, on the ground that it was a part of the public easement, would be destructive of the entire system of city rail roads. *Per BROWN, J.*

THESE were appeals from an order made at a special term, dissolving an injunction obtained by the Brooklyn City Rail Road Company; and from an order denying the motion of that company to dissolve an injunction obtained by the Brooklyn Central Rail Road Company.

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J. W. Gilbert, for Brooklyn Central Rail Road Company.

G. T. Jenks, for Brooklyn City Rail Road Company.

BROWN, J. The plaintiffs and the defendants in both these actions are corporations duly organized and created under the laws of the state, with the power and for the purpose of constructing railways and operating rail road cars with horses and mules over certain streets in the city of Brooklyn. The City Rail Road Company was organized anterior to the 19th day of December, 1853, but the precise day does not appear upon the papers, nor is it shown when the Central Company was organized, but it was some years after the organization of the other company had been perfected.

Furman street is one of the routes designated in the articles of association of the City Company and in the resolutions of the common council of the city signifying its assent to the construction of the railway. It runs from the foot of Fulton street to the foot of Atlantic street; one of its termini being very contiguous to the Fulton Ferry, and the other to the South Ferry, and in its course it passes conveniently near the Wall street Ferry at the foot of Montague street. The street is thus in immediate communication with the three ferries upon the shores of the river or bay, and which are the great channels of communication between the cities of Brooklyn and New York. Before the commencement of the litigation, the Central Company was operating a horse railway from the South ferry along Atlantic street to Bedford, a point in the eastern section of the city. This was its only line. The City Company at the same time was operating several routes, all having a common terminus at the Fulton Ferry. In May, 1860, in completion of one of the routes claimed under its charter, which should pass from Fulton ferry along Furman street, to and across Atlantic street into Columbia street, where it intersects Atlantic nearly opposite Furman street, and from thence into the southern part of the

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city, the City Company had constructed a railway in Furman street at its own expense and for its own exclusive use. The Central Company thereupon asserted a claim or right to the use of the railway in common with the City Company, and commenced its action and obtained an injunction from Mr. Justice Scrugham, restraining the City Company from interfering with the Central Company in the use of the railway thus constructed, and from bringing or instituting any suits or taking any legal proceedings to prevent the use of the railway by the Central Company. It then commenced running its cars upon the railway. The injunction was subsequently modified by the removal of the restriction upon the institution of legal proceedings. The City Company thereupon commenced their action against the Central Company, and obtained from Mr. Justice Emott an injunction restraining the last named company from the use of the railway. This injunction was afterwards, upon the motion of the Central Company, dissolved by an order made at a special term, and the justice holding the special term at the same time denied the City Company's motion to dissolve the injunction obtained by the Central Company. From both orders the City Company appealed to the general term. The question involved is the same in both actions, and is the right of the City Company to the exclusive use of the railway laid down by it in Furman street.

There are some things which appear from the papers in these motions which admit of no sort of dispute. And as they will serve to exhibit the rights and claims of the contending companies in a clear and conspicuous light, I will proceed to state what they are.

The City Rail Road Company was established and commenced operating portions of its route long before the Central Rail Road had any being, and while the scheme of railways for cities was yet in its infancy, and an untried and hazardous experiment. Its organization was effected under the act to authorize the formation of rail road companies and

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to regulate the same, passed April 2d, 1850, and its charter or articles of association designated the routes or streets of the city over and through which its rail road was designed to be constructed, and Furman street, the route in litigation, is one of them. The 5th subdivision of the 28th section of the act required the assent of the corporate authorities of the city of Brooklyn before the company could proceed with the work. This assent was given, by a resolution of the common council, passed December 19th, 1853, and approved by the mayor on the 22d of the same month. There were certain conditions annexed to the consent, which involved necessarily the expenditure of very considerable sums of money by the company, and imposed upon it duties and obligations of an onerous character. Among these is the obligation to construct bridges for the passage of the water; the maintenance of the pavement within the track of the road, and for the space of three feet on each side thereof, in thorough repair, under the direction of the common council; the transportation of passengers at certain prescribed rates of fare; the payment of license fees for each car run upon the railway, and the complete construction of the railway over the given routes by a day named in the resolution; the execution of a good and sufficient bond in the sum of \$200,000, conditioned for the faithful performance of the prescribed conditions. It is not claimed that the company have failed in the performance of the conditions upon which the assent of the common council was given, except that in regard to the construction of the entire road within the time therein limited. On the contrary the railway has been made, and in successful operation for a number of years. Passengers have been transported at the prescribed rates of fare—the pavements have been kept in repair—the requisite bond executed, and the license fees, from time to time, paid into the city treasury.

The 2d section of the act of the 23d March, 1854, in relation to the Brooklyn City Rail Road Company, was designed to confirm, as far as it needed confirmation, the title of the

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company to the franchise claimed, for it declares in express words that "the said company are hereby authorized to construct and operate their said rail road over the several routes mentioned in their articles of association." This grant is to construct and operate, and therefore comprehended as well the finished as the unfinished routes referred to in the charter. It is a grant of the franchise, with all the incidents, from the sovereign power of the state, and so far as I can see has not been repealed or modified in any degree. Its effect is to relieve the company from all dependence upon the common council of the city for leave to lay down its track upon the streets of the city mentioned in the articles of association, if such assent had not been previously obtained.

The second section of the act to which I last referred also contained an authority to the company to continue their said road "from the termination thereof respectively as designated in the said articles of association, subject to the provision of the act to authorize the formation of rail road companies and to regulate the same, passed April 2d, 1850, into or through any town in the county of Kings," &c. The qualifying clause "subject to the provisions of the act authorizing the formation of rail road companies," does not apply to the first clause of section 2, which grants the power to construct and operate the road upon the route designated in its charter; but to that portion of the section which provides for the continuation into and through other towns of the county of Kings.

There is another undisputed fact in the case which must not be omitted in this connection; and that is, that the City Rail Road Company, in execution of the power to which I have referred, proceeded at its own expense and with a view to its own exclusive use, to construct and lay down the railway in Furman street which is the subject of this litigation. In the case of *The State of New York v. The Mayor &c. of the City of New York*, (3 Duer, 119,) the superior court held that a resolution of the common council granting to Jacob Sharpe and others the right on certain conditions to construct

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a rail road in Broadway and to run cars upon it, was not an act of legislation, nor a law, in the proper sense of the term, but the grant of a franchise, and when accepted by the grantee, became a contract upon the terms and conditions set forth in the resolution and ordinance. And inasmuch as the common council had no power to release the control over one of the principal streets of the city, its resolution and the grant claimed under it was declared to be invalid and void. The resolution of the common council of the city of Brooklyn of the 19th December, 1853, by which it signified its assent to the construction of the rail road over the routes designated in the articles of association of the City Rail Road Company upon the conditions annexed thereto, was authorized by the 5th subdivision of the 28th section of the general rail road act, and therefore lawful, and the acceptance thereof with the conditions annexed by the City Company, constituted a contract which the company was bound to perform, and which the common council could not rescind without adequate cause. Rights acquired under a statute of a state, which is in its nature a contract, and which does not reserve to the legislature the power of repeal, cannot be divested by subsequent legislation. In *Dartmouth College v. Woodward*, (11 Wheat. 511,) it was held that immunities, franchises and other rights, whenever they are the subject of a contract or grant, are as much within the reach and protection of the constitution of the United States as any other grant. The grant to the City Rail Road Company, and its acceptance upon the conditions annexed, with the duties and obligations and large expenditures resulting therefrom, would seem, therefore, upon the principles I have endeavored to state, to invest the company with the right of property in the franchise, of which it cannot be deprived without its consent or against its will.

By a reference to the complaint of the Brooklyn Central Rail Road Company, in the first of the above entitled actions, and upon which it obtained its injunction, it will be seen

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that its claim to the use of the railway in Furman street is placed upon two grounds.

First. The Central Rail Road Company claim that the Brooklyn and Jamaica Rail Road Company had the right by grant from the legislature of the state to construct and operate a rail road through the streets of the city of Brooklyn, which right or franchise had been duly assigned over by the Jamaica Company to the Central Company. It also claims that on the 29th November, 1859, the common council of Brooklyn adopted certain resolutions which recited that the Brooklyn City Rail Road Company did not construct a rail road through Furman street by the 1st day of December, 1855, conformable to one of the conditions annexed to the assent of the common council given to that company to construct the road upon the route designated in its charter. And that the Brooklyn and Jamaica Company was desirous of extending its road through Furman street, which was manifestly for the public advantage. It was therefore resolved that the assent of the common council was given to the Jamaica Company or its assigns to extend its road through Furman street to Fulton street, and that the City Rail Road Company have the right to use the said track of said road in common with the Brooklyn and Jamaica Company or their assigns, provided it united with the Jamaica Company in constructing its road and bearing an equal part of the expenses, &c. To make this claim of any avail it must appear that the Jamaica Company had a franchise for a road in Furman street which it could assign, and then that the common council had power and authority by its own vote to annul and impair the rights acquired by the City Company under the grant to it. Neither of these propositions can be maintained. The Jamaica Company was incorporated by an act of the legislature passed April 25th, 1832, with the right to construct a rail road commencing at an eligible point within the village of Brooklyn, and extending to any point within the village of Jamaica, with lateral railways to the villages of Flatbush and Flushing. The

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grant was not to commence at several points, but at one point in Brooklyn. It was not to ramify itself through the several streets of the city at any and at all times thereafter, but to run from the one point direct to another point in the village of Jamaica. The company accordingly located its western terminus at the foot of Atlantic street, and its eastern in the village of Jamaica, where they have ever since remained. Having made its location and adhered to it for many years, it is concluded by what has been done. It had no franchise in Furman street which it could assign to the Central Company. The common council were equally without the power to annul or impair the grant to the city company for failure to complete the road within the time limited by the conditions annexed to the grant, in the summary manner claimed. I do not rely so much upon the express grant to the company by the 2d section of the act of the 23d March, 1854, as I do upon the general principles which govern conditions of the kind referred to. Speaking of franchises, Chancellor Kent, in his Commentaries says, (*vol. 3, p. 458,*) "they contain an implied covenant on the part of the government not to invade the rights vested, and on the part of the grantees to execute the duties and conditions prescribed in the grant. The government cannot resume them at pleasure, or do any act to impair the grant, without a breach of the contract." He also says at page 459, that "an estate in such a franchise and an estate in land rest upon the same principles, being equally grants of a right and privilege for an adequate consideration." It was said by Chief Justice Holt, (*12 Mod. Rep, 271,*) that all franchises are granted upon condition that they shall be duly executed according to the grant, and if the grantee of such franchises neglect to perform the terms, the patents may be repealed by *scire facias*. If the Central Company claim that the common council have the right to annul or impair the grant to the City Company for a breach of the condition to complete the work in the given time, it encounters this impediment. The condition to complete within a given time is

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one of those distinguished in the law as conditions subsequent. The effect of a deed with a condition subsequent is to vest the estate in the grantee subject to be defeated by his omission to perform the condition. The omission does not *ipso facto* determine the estate, but exposes it to be determined at the election of the grantor. These conditions, and forfeitures consequent thereon, are not favored in law, because they tend to destroy estates. When the grantor institutes proceedings to recover the estate, for conditions broken, the grantee may show that its performance has become impossible by reason of the acts or omissions of the grantor, or has been waived or dispensed with; and this he may do by proving a waiver in express words, or by any act or series of acts from which a waiver of the performance of the condition may be implied. Whether the routes mentioned in the articles of association of the City Company and upon which the railway is not constructed, have not been in a condition to receive the superstructure of the road through the neglect or inability of the city government, as was suggested upon the argument, or whether the taking of the bond referred to the conditions, and the receipt, from time to time, of the license fees into the city treasury, are to be deemed a waiver of the performance of the condition to complete the road within the time limited, I do not propose to consider. It is enough now to say that upon these questions the City Company has a right to be heard, and that nothing short of a judicial decision upon the point involved, can deprive it of the franchise, or impair its rights of property therein.

Second. The Central Company next claims, in its complaint, that it has acquired a right to the use of the rail road in common with the City Company by force of a contract or agreement made by Henry R. Pierson and George S. Howland, a committee on the part of and empowered to act for the latter company with a like committee on the part of the Central Company, composed of Jacob Frost, R. H. Thompson and Ira Smith. It refers to a paper in writing annexed

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to the complaint, as the instrument containing the contract. This paper is signed by Henry R. Pierson and George S. Howland, and bears date the 8th of December, 1859. They therein describe themselves as a committee from the City Rail Road Company, and say they have met a like committee on the part of the Central Company, and having conferred with them as to the mutual use of Furman street by said companies for rail road purposes, have agreed to recommend to the City Rail Road Company to permit the Central Company to use said road in Furman street upon the following terms, which are to be a lease at an annual rent, with provisions for the proper repair of the road, and fair and equitable arrangements for the common use by said parties of the roads on Atlantic street and Flatbush avenue, as each may require, and generally with full, specific and fair arrangements for the mutual protection and interest of said companies in the several roads owned by each, both by each other and from outside parties. This agreement, the complaint further alleges, was duly ratified and accepted by the board of directors of the City Company on the 12th of December. The evidence of which consists in a letter by Henry R. Pierson on behalf of the committee, of that date, in which he says: The Brooklyn City Rail Road Company, at a meeting of the board of directors, empowered the committee with authority to consummate the arrangements with the Central Company, as set forth in the memorandum of the 8th of December in reference to Furman street, and that the committee would prepare and submit a full agreement at its earliest convenience. The papers also show that drafts of agreement were prepared by the committee of the City Company and submitted to the committee of the Central Company, who proposed amendments thereto, and for causes which do not clearly appear, but which are of no sort of consequence to the present inquiry, the arrangement was never made or consummated, and no leases or agreements were executed. The question is upon

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the existence of a contract which it is obligatory upon the city company to execute.

The contracting parties are corporations having a common seal and acting and expressing their assent to contracts through their board of directors and other officers. The burden of establishing the existence of this contract rests upon the Central Company. It must show that the City Company accepted and entered into the agreement, or that some persons duly authorized entered into it for the company. The two papers of the 8th and 12th of December, 1859, lack all the essential attributes of a contract. Neither of them was signed by the Central Company or any person authorized by claiming to be authorized to act in its behalf. The agreement was without mutuality, and without consideration. It is essential to the validity of a contract that the minds of the contracting parties should meet. There must be a concurrence of intention, not only upon one of the stipulations of the contract, but upon them all. By the memorandum of the 8th of December, Henry R. Pierson and his associates "have agreed to recommend to the said Brooklyn City Rail Road Company to permit the Central Road to use said road on Furman street." The rent was to be six per cent per annum upon the cost price of the road, but the cost was not specified. The time granted was not mentioned, the fair and equitable arrangements for the common use of the road on Atlantic street and Flatbush avenue, and for the mutual protection and interest of the several companies in the roads owned by each, both by each and outside parties were not prescribed or defined, but were left open for future negotiation. So long as any one material subject or stipulation of the agreement remained unconsidered and undetermined, it was not obligatory upon either party. Nor does the letter of the 12th of December furnish any evidence of a ratification of the contract by the City Company. It announced that Henry R. Pierson and committee had authority to consummate

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the arrangement upon the terms of the memorandum of the 8th of December, and that it would prepare and submit a full agreement thereafter. The paper is not a ratification, and does not profess to be a ratification, of any thing. The claim of title by the Central Company to the use of the road in Furman street, so far as it rests upon the alleged contract, cannot be supported.

There is one other point made by the counsel for the Central Company which I think it worth while to notice. It is this: "That when a rail road is laid down in a public street it becomes a part of the street, and may be used as such by the people at large without permission, and by another corporation for hire, under the license or authority of this city." If this proposition had been limited to the incidental use of the track by the public in crossing over or passing along the rails and superstructure of the road with carriages and vehicles in ordinary use, there could be no objection to it, because to this extent the public must have the right to pass and repass, and may do so without the slightest interruption to the owners of the franchise. But I understand the proposition is designed to go far beyond this, and to assert the right of the public at large and other rail road corporations, with the license of the municipal authorities, to use the road with the appropriate cars or carriages for the transit of passengers, in common with the owners of the franchise. If the proposition is not designed to go thus far, it could be of no value to the Central Company upon this appeal. That there might be no misapprehension as to what was intended, we were referred, on the argument, to the iron pavements covering the entire surface of some of the streets in the city of New York, and of which all men have the common use, as analogous to the railway of the City Company in Furman street. This is novel doctrine to come from the counsel of a rail road corporation, claiming a similar franchise for itself in other streets of the city; for if it could be maintained, it

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would be subversive of its own rights of property as it would be of those of the City Company, and indeed of every other city rail road corporation. Under such a rule who would incur the cost of laying down a railway and putting cars upon it for the accommodation of passengers? What rules could be devised and adopted to regulate the number of vehicles employed—the rates of speed and the direction in which they are to be driven—so as to insure regular, systematic and effective use of the road and the security of passengers traveling thereon? Rail roads are only possible in great cities, when laid down in the public streets and thoroughfares. It is there that they find the requisite space for transit, and there only that they find the passengers and furnish the requisite public accommodation. Any rule, therefore, which would recognize the right of the public, and such other corporation as the municipal authorities might choose to license, to the indiscriminate use of a railway constructed in a public street, upon the ground that it was a part of the public easement, would be destructive to the entire system of city rail roads. To become useful, profitable and free from danger, their control and management must necessarily be exclusive. The error consists in regarding the railway as part of the street, which the iron pavement doubtless is. The sills, ties, and rails are laid upon the street, but they are not a part of it. They constitute a part of the machinery for the transportation of passengers, and although placed upon the street, no more become a part of it than the cars and carriages which are placed upon the rails.

In *Davis v. The Mayor &c. of New York*, (14 N. Y. Rep. 506,) the principal question was upon the power of the common council, under its authority to regulate streets, &c. to grant to Jacob Sharpe and his associates the right to lay down and use a rail road in Broadway, and necessarily involved the question whether the proposed railway would become a part of the street. I may, therefore, quote as authority

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some of the observations of Judge Denio upon that branch of the case, and from which few men will be prepared to dissent: "A rail road has no necessary relation to or connection with a common highway or street. It may be laid along the surface of such a road when the grade will permit it, but it may equally well run through the country remote from a highway, and upon a level graduated for that purpose. When a rail road and a highway coincide, the circumstance is simply incidental. They are separate and distinct agencies to facilitate passage and traffic, differing from each other in many essential particulars. The object of a highway or street is to afford to every citizen an opportunity to pass on foot, or with his horses and carriage, from one locality to another, and it is essential to the legal idea of such a road that it shall be common to all. Now a rail road does not facilitate traveling on foot or on horseback, or with one's carriage. It does not generally admit of these methods of passage, although when rail road carriages are not moved by the power of steam, but by horses, the tracks, when they do not rise above the street level, may be safely crossed, and to a limited extent may be used for passing lengthwise. This, however, is only incidental, and not a necessary feature of a rail road. Those who use a rail road for its proper purpose do not travel according to their own volition, but are transported like freight or baggage by the proprietors of the road, in their own vehicles. But the feature which most widely distinguishes a rail road from ordinary highways and streets is that the former is a strict monopoly, entirely excluding all idea of competition. The nature of the subject requires a unity of control and management, which precludes the existence of competing carriages. There may be rival roads, but there can be no rivalry on the same road."

This is sufficient for my present purpose, and is decisive against the right of the public or any rival corporation to use the railway of the City Company in Furman street on the ground that it became a part of the public easement. It is

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obvious that without this law of exclusive use and unity of control and management there can be no franchise, and no right of property in either company, in the railways laid down by them respectively in the streets of the city. For the legal idea of a franchise is an immunity, a privilege, a legal right to the enjoyment of something beneficial to the grantee which is withheld from others. This is not the only anomaly in the argument of the Central Company. The reasons assigned in support of the injunction not only conflict with its claim to property in its own franchise, but they are hostile to one another. *First.* It says that the City Company has lost its right to the Furman street route by neglect to complete the work within the time limited by the conditions of the grant, which has become vested in the Central Company by assignment from the Jamaica Company and the assent of the common council. *Second.* That the City Company are lawful owners of the franchise, and the Central Company their tenants and lessees under the contract of the 8th and 12th of December. *Third.* That neither company has any such right, because the railway is part of the public easement, and its use therefore common to all who may choose to enjoy it.

I conclude, for these reasons, that the Central Company has failed to establish any right to the use of the rail road in Furman street, and that the injunction order obtained in its action against the City Rail Road Company should be reversed, with the usual costs of opposing motion at the special term, and the costs of the appeal therefrom, should the City Company ultimately succeed in the action. And also that the order made at the special term, denying the injunction prayed for in the action wherein the City Rail Road Company is plaintiff, and the Central Rail Road Company is defendant, be reversed, and an order be entered directing an injunction to issue, according to the prayer of the complaint, upon filing the usual security, the form and amount of which to be settled by one of the justices of this court, and that the City Company also recover the usual costs of the

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motion at the special term, and upon this appeal, should it ultimately succeed in the action.

EMOTT, J. concurred.

SCRUGHAM, J. dissented.

[ORANGE GENERAL TERM, September 10, 1860. *Emott, Brown and Scrugham*, Justices.]

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32b 374
83 AD 41

Where the premises intended to be conveyed by a deed were not described therein by metes and bounds, nor by monuments, and there was nothing in the deed itself by which the land could be located and its lines ascertained, but the grant was of nine lots in the city of Brooklyn, known and designated, on a map of 151 lots of ground, &c. made by J. L., surveyor, dated 18th September, 1833, and filed in the office of the clerk of the county of Kings as Nos. 140, &c.: *Held* that the map thus referred to became a material and essential part of the conveyance, and was to have the same force and effect as if it had been incorporated into the deed.

And the lots conveyed being, by the map, bounded, on the west, by a public turnpike; it was *further held* that the effect of the deed was to convey the lands up to the turnpike road as that existed and was located at the date of the deed. That the true boundary was to be ascertained, not by inquiring where the east line of the turnpike road was on the 18th of September, 1833, when the map was filed, but on the 17th of July, 1851, when the deed was given. And that if the line of the turnpike had been changed, between those dates, the grantor should, in the deed, have qualified the force of the description on the map, by an intimation of the change.

A PPEAL from a judgment entered at a special term, after a trial at the circuit, by the court without a jury.

D. T. Walden, for the plaintiff.

E. H. Kimball, for the defendant.

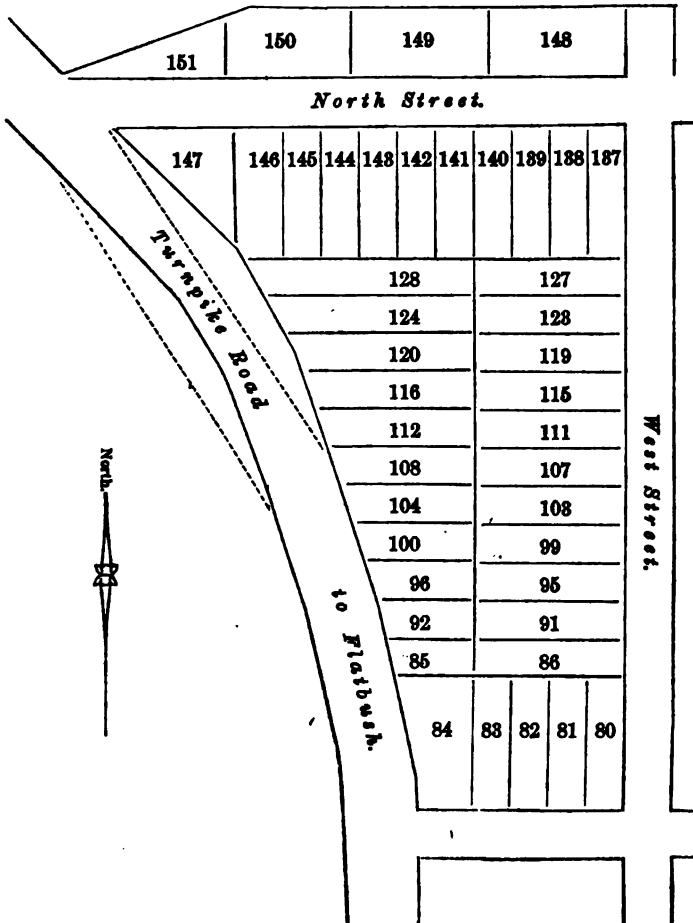
By the Court, BROWN, J. This action is brought to recover the possession of two small pieces of land in the city of Brooklyn. It was tried at the Kings circuit, in November, 1859, before Mr. Justice EMOTT, without a jury, who rendered judgment for the defendant. In respect to the piece of land secondly described in the complaint, the defendant made

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no claim of his title, and the proof as to possession being contradictory, the court found that fact in favor of the defendant, and thus concludes all future inquiry in regard thereto. The real question arises upon the plaintiff's title to the piece of land first described in the complaint.

Joseph Evans is the original source of title. In 1833, being the owner in fee of lands lying on both sides—east and west—of the Flatbush turnpike, he caused a map(a) to be

(a) Map of premises.



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made of 151 lots of ground lying on the east side of the turnpike road, by Jeremiah Lott, surveyor, dated September 18, 1833, which map he filed for future reference, in the office of the clerk of the county of Kings. These lots were designated by numbers, from one up to 151 inclusive, and a part of them adjoined upon the turnpike road. The general direction of the road is southerly, and runs in a curve or part of a circle where it passes lots Nos. 147, 146 and 128, owned by the defendant, and 124, 120, 116 and 112, owned by other persons. After Evans had laid out the property in this way, and filed the map, he had a sale thereof, which I take to have been a public sale, but how much he sold and what part he retained does not appear. After this time, and before May 1st, 1854, he altered the turnpike road along and west of the lots to which I have last referred, contracting it on the east and enlarging it on the west, and removed a part of the curve and made it more direct. But how much the road was drawn in upon the east and pushed to the west does not appear. I assume, however, from an inspection of the map, that the alteration did not extend to the middle of the turnpike road. This made a small gore of land between the old and new lines of the road where it passed west of the lots now owned by the defendant, and is the land the possession of which the plaintiff claims to recover in this action. No change, however, was made in the fences which enclosed the defendant's lots, until long after he had acquired his title; and the map made by Jeremiah Lott, the surveyor, and filed in the clerk's office, remained and yet remains as it was when made.

On the 1st of May, 1834, Joseph Evans and Catherine Ann his wife, by their deed of that date, conveyed 17 of these lots, including lots 147, 144 and 128, now owned by the defendant, to the plaintiff, Ralph Glover. They are described in the deed as being in the city of Brooklyn, and known and distinguished on a map of 151 lots of ground on Mount Prospect, Brooklyn city, Long Island, made by Jeremiah Lott, surveyor, dated 18 September, 1833, and filed in the office of the clerk of the

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county of Kings, as numbers 119, and so on, giving the numbers of the lots, 17 in all. And "also a piece or parcel of land not laid down on said map formed by a line, beginning at the northwesterly angular corner of lot number 147 of said map, thence running southerly in a direct line to the northwesterly corner of lot number 108 of said map, including the land between said direct line as far as opposite the south line of 120 of said map, and the westerly lines of lots 147, 146, 128, 124 and 120, be the dimensions more or less. Said lots and pieces of land are bounded as follows, viz: on the north by North street on said map; on the east by West street; on the south by lots 115 and 116; and west by the aforesaid direct line which borders on the Flatbush turnpike, including the land forming said streets adjoining and in front of said lots to the middle of the streets, subject to the use of the land in front of said lots by all the owners of lots fronting thereon, and by the public generally, as public streets, according to the map hereinbefore referred to." This deed was made evidence by the plaintiff. He also produced and proved a mortgage executed by himself and wife to Maria Evans, dated October 11, 1834, upon the same lands, and with the same identical description. Also the record of proceedings in the late court of chancery to foreclose the mortgage, with the decree and report of sale and master's deed to Maria Evans, dated December 8th, 1841. This deed also contains the same description of the premises. He next produced in evidence a deed from Maria Evans to Ralph Glover in fee, dated March 29th, 1849, duly acknowledged and recorded, for the same premises and with the same description as that contained in the mortgage and master's deed before referred to. There was also read in evidence upon the trial, a deed in fee simple from Ralph Glover and Amelia his wife to Mary Berger, dated July 17th, 1851, for nine of these same lots, by the following description: "All those certain nine lots, pieces or parcels of ground, situate, lying and being

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on Mount Prospect, in the 9th ward of the city of Brooklyn, and known and designated on a certain map of 151 lots of ground on Mount Prospect, Brooklyn, L. I., made by Jeremiah Lott, surveyor, and dated September 18, 1833, and duly filed in the Kings county clerk's office, as and by numbers 140, 141, 142, 143, 144, 145, 147 and 128, including the land adjoining said lots to the center of North street as laid down on said map, subject to be opened as a public street whenever the owners of a majority of the lots fronting thereon shall decide." The defendant, it appeared, was in possession of lots described in this deed, under a regular title derived from Mary Berger. He was also in possession of the premises in dispute, and claimed title thereto under the deed to Mary Berger. Flatbush turnpike, during the time of these several conveyances, was and still is an open traveled road. North street was subject to be opened at the will of the owners of a majority of the lots fronting thereon, and was at the time of the trial an open highway.

One of the objects of the plaintiff in producing the two deeds to himself, and the mortgage and the master's deed to Maria Evans, was to show that the gore of land supposed to have been carved out of the property by the alteration of the turnpike road was a separate and distinct piece of land, because in these several conveyances it is described as a separate piece of land. The force of this fact upon the question of title, however, is much impaired by the consideration that the conveyance of both pieces—if there were separate pieces—was in these several conveyances to the same person. That the title has always vested in the same person, and that they have not been separately enclosed or separately occupied. The motive for a separate and additional description of the gore may have been greater certainty, and a more perfect assurance that the one passed with the other. I attach very little importance to the manner in which the premises are described in these deeds, because the defendant's title is to be

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determined upon the force and effect of the deed from the plaintiff to Mary Berger, and the concurrent circumstances under which it was executed. The premises are not described by metes and bounds, nor by monuments placed upon the ground and referred to in the deed. There is nothing in the deed itself by which the lots can be located and their lines ascertained. Looking at the deed alone, it is impossible to say what lands or premises were intended to be conveyed, or the form and dimensions of the lots therein enumerated. The map made by Jeremiah Lott in 1833, and filed in the clerk's office, is the instrument which defines what the grantor sold and the grantee purchased. The grant is of the nine lots of ground known and designated on this map as numbers 140, &c. The map thus becomes a material and essential part of the conveyance, and is to have the same force and effect as if it was incorporated into the deed. The question is not as to the effect and extent of a grant running to a road, or along a road, or bounded by a road or a public highway by any other words, as in the cases to which we have been referred, of *Sizer v. Devereux*, (16 Barb. 160,) and *Smiles v. Hastings*, (24 *id.* 44.) In the present case the real question is whether the western boundary of the defendant's lot reaches the Flatbush road at all; for the plaintiff's claim is to recover the land which he thinks and alleges lies between the western line of the lots granted to Mary Berger, by the deed of the 17th July, 1851, and the direct line running from the north-westerly angular corner of lot No. 147 to the north-westerly corner of lot No. 108, which borders on the Flatbush turnpike, and mentioned in the deed from Joseph Evans and wife to the plaintiff, of the date of May 1st, 1834. The defendant insists there is no such premises; that the effect of the deed to Mary Berger is to convey the lands up to the Flatbush turnpike road as that existed and was located on the 17th of July, 1851, the date of the deed. The true boundary is to be ascertained, not by inquiring where the east line of the turn-

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pike road was on the 18th September, 1833, when the map was filed, but on the 17th July, 1851, when the deed was given. How can it be otherwise? The deed contained no intimation where the boundary was, but referred to the map for that purpose, which thus became a part of the deed. The map bounded the lots upon the westerly side by the Flatbush turnpike road, and thus the grantor adopted the line of the road as it then was located as the true boundary. This deed, if there is any uncertainty in the description, is to be taken most strongly against the grantor, and construed most favorably for the grantee. The purchaser doubtless looked at the map in the clerk's office to learn where the lots were, the quantity of land they contained, together with their location as to roads and streets, with a view to access and profitable occupation, and there saw that they were bounded in part by the turnpike road. But this is not all. The plaintiff and Mary Berger both say in their testimony, that during the negotiation for the purchase of the property, he exhibited to her for her information a copy of the map made by Jeremiah Lott in 1833, and that by the map so exhibited the lots purchased by her were bounded on the turnpike road. She also says he pointed out to her a willow tree on lot No. 147, and the corner of the turnpike road, as the boundary of the lots at the time of the purchase. It cannot be worth while, I think, to inquire whether these acts and representations of the plaintiffs do not conclude him from asserting any other boundary line, as an estoppel *in pais*; for if I do not misapprehend their effect they show that he has no manner of title. If he had designed to limit his grantee to a boundary short of the line of the road, it was an easy thing for him to have put the limitation in the deed, or qualified the force of the description on the map, by an intimation that the turnpike road had been altered. But having conveyed by the map, without limitation or qualification, and that paper giving the road as the western boundary of the lots, he has parted

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with the title up to that line as effectually as if he had given the road as the boundary by express words written in the deed.

The judgment should be affirmed.

[ORANGE GENERAL TERM, September 10, 1860. *Lott, Emott and Brown, Justices.*]

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THE LONG ISLAND RAIL ROAD COMPANY vs. CONKLIN and others.

D. and his wife, by their deed of conveyance, for a valuable consideration, granted, bargained and sold to the Long Island Rail Road Company, and to their successors and assigns forever, a certain piece of land therein particularly described, comprising an area of sixty square rods, expressing it to be "for the uses and purposes of the road proper." "Also, in addition to which 60 square rods, the Long Island Rail Road Company *may be* further entitled to an extra additional width of 70 feet on the south side of the said rail road, for the uses and purposes of a side track, engine house, depot, or such buildings and appendages to said road as may be considered necessary; provided such buildings may be used for the purposes of said road only, and which additional land contains an area of 64 square rods, more or less;" *habendum* "all and singular the above mentioned and described premises to the Rail Road Company, their successors and assigns forever;" with the usual covenant of warranty. *Held* that the purpose of the grantors, in inserting the words "may be," in the clause relative to the second parcel of land described, appearing, from an examination of the whole instrument, to have been to vest the title to that parcel in the grantee, the words "may be," might be read "shall be:" the court not being bound to adhere to the literal and grammatical sense of the words used.

And that, inasmuch as by the terms of the deed, the grantees were to take and enjoy the first described lot for the uses of the road proper, and the second described lot for the uses of a side track, engine house and depot, and whatever was granted in the premises of the deed was, by the *habendum*, to be held in fee, with a covenant of warranty, it was the intention of the grantors to pass the title to both parcels of land described in the deed; and such was its legal effect.

Where the grammatical sense of the words is not in harmony with the obvious intention of the parties, the courts do not hesitate to substitute one word for another, for the purpose of giving effect to such intention. *Per BROWN, J.*

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APPEAL from an order made at a special term, denying a motion for a new trial. The action was for the recovery of real estate.

Miller & Tutthill, for the plaintiff.

J. Lawrence Smith, for the defendants.

By the Court, BROWN, J. The plaintiff's complaint in this action was dismissed at the trial at the Suffolk circuit, in October, 1859, upon the ground that it showed no title or right of possession to the lands and premises which it claimed to recover. The plaintiff was not entitled to a verdict unless it had a valid subsisting interest in the premises claimed and a legal right to the possession thereof, at the time of the commencement of the action. It appeared that one Edward Dodd, on the 28th of December, 1841, was the owner in fee of the premises described in the complaint, together with other lands adjoining the same. By his deed of conveyance bearing date on that day, executed in proper form by himself and wife, of the first part, and the Long Island Rail Road Company of the second part, and for and in consideration of the sum of one dollar, he granted, bargained and sold, aliened, released, conveyed and confirmed unto the Long Island Rail Road Company, and to their successors and assigns forever, "all that certain piece of land situate and being in the town of Huntington and county of Suffolk, bounded as follows: commencing at a point on the road leading from Dix Hills to Babylon, commonly called the straight path, where the second division of the Long Island rail road crosses the same, and thence along said rail road, the center line of which bears north seventy-nine degrees east a distance of 250 feet, and which said line of road is to have a uniform width of four rods, for the uses and purposes of the road proper, and comprises an area of sixty square rods. Also, in addition to which sixty square rods, the Long Island Rail Road Company

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may be further entitled to an extra additional width of seventy feet on the south line of said rail road, for the uses and purposes of a side track, engine house, depot, or such buildings and appendages to said road as may be considered necessary, provided such buildings may be used for the purposes of said road only, and which additional land contains an area of sixty-four square rods, more or less;" together with the tenements, appurtenances, &c.; and also all the estate, right, title, interest, dower, right of dower, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, &c. Habendum, all and singular the above mentioned and described premises to the Rail Road Company, their successors and assigns forever; with usual covenant of warranty. The action was brought by the plaintiff to recover the possession of the lot last described in the deed. It also appeared in the evidence, that the railway of the company was laid upon the piece of land first described in the deed, in 1842, for which purpose it had been since occupied by the plaintiff. That at the same time an engine house was built on the tract last described in the deed, and also a turn-out track. These erections remained about one year, when they were removed further east to the Suffolk station. This lot had been occasionally used since that time by the company for depositing wood. A tool house was also built by the company upon a part of the lot, and also a house for storing paper, and part of another engine house was put upon it in 1844, and continued there until 1854. After the evidence was closed, the defendants insisted that the plaintiff showed no title and no right to the possession, and that in respect to the seventy feet on the south side of the rail road, the deed conveyed no present interest in the premises, and that the legal title, notwithstanding the deed, still remained in the grantor or those claiming under him. And in this view the court concurred, and so ordered the complaint to be dismissed. The only question, therefore, to be considered, is the construction to be

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given to the deed; and we are to say whether it was effectual to pass the title to the seventy feet of land to the grantee therein named.

The language of the deed, in regard to the premises in dispute, is peculiar, and widely dissimilar from that in regard to the lot first described for the principal track of the road. In respect to the latter the words are technical and artistical, and such as long usage and the best skill has selected and appropriated to the conveyance of titles to real property; while those in regard to the seventy foot lot are neither apt nor appropriate, nor such as are usually employed in deeds for the transmission of titles to real property. If the question is to be determined upon the grammatical and literal sense of the words employed in the deed, it would be impossible, I think, to say that the words "may be further entitled to the extra additional width of seventy feet on the south side of said rail road," would have the effect to pass the title from the grantor to the grantee; for they do not express an absolute intention to pass a present estate at that time, in the premises. This deed is not, however, to be construed and its effect upon the title determined by looking at these words alone, nor by adhering to their strict grammatical import. But we are to ascertain, if we can, what was the intention of the parties to the deed; and this can only be done by examining and considering all parts of it. Where the grammatical sense of the words is not in harmony with the obvious intention of the parties, the courts do not hesitate to substitute one word for another for the purpose of giving effect to such intention. This rule of construction applies to deeds and wills and also to statutes. *Jackson v. Blanshan*, (6 John. 54,) is an example of what the courts will do under such circumstances. The question was upon the construction of a will. The testator had devised his real property to his six children, with this limitation: "But if any one or more of my above named children should die before they arrive to full age, or without lawful issue, that then his, her or their part or share

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of my estate shall devolve upon and be equally divided among the rest of my surviving children." Mathew, one of the sons, died without lawful issue, after he was of full age, and after he had parted with the estate by a title under which the defendants held, leaving the lessor of the plaintiff the only surviving child of the testator. The court held the devise to Mathew absolute as soon as he became 21, though he had no lawful issue, and that the words "or without lawful issue" should read "and without lawful issue;" thus substituting one word for another, to give effect to the intention of the testator as collected from the entire instrument. Chief Justice Kent reviews and refers to all the English authorities, which it seems had been in conflict. *Jackson v. Topping*, (1 *Wend.* 388,) was a case of the same kind, and arose upon the construction of a deed. The deed contained a covenant on the part of the grantee that he would pay all the debts outstanding against the grantor, and would keep him harmless and indemnified from all such debts, and from all actions, suits and damages that might arise from the non-payment thereof. Then followed the condition upon which the question arose, that if the grantee should neglect or refuse to pay and fulfill all the covenants and conditions contained in the deed, and should suffer the grantor to be put to any costs, trouble or expense on account of the same, or should neglect or refuse to provide for him a maintenance in the manner specified in the deed, then in all or either or any of the cases aforesaid, it should be lawful for the grantor to re-enter and repossess and enjoy his former estate, &c. The material question was whether, in order to create a forfeiture of the estate, there must be both a refusal to pay the debts and proof that the grantor was put to costs, trouble and expense; in short, whether the word "and" was to be construed as a copulative or a disjunctive. In its literal and grammatical sense it was the former, doubtless; and so construed, both the neglect to pay the debts and subjecting the grantor to the payment of costs by reason thereof must concur in order to

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work a forfeiture of the estate. The court held otherwise, however, determining that the word "and" must be read as the disjunctive "or;" and so awarded the estate to the heir at law of the grantor. It is true that Mr. Justice Woodworth, who delivered the opinion, inclines to think that to create a forfeiture during the lifetime of the grantor, both contingencies must happen, but after the death the contingency of neglecting to pay the debts would be enough. But this view also resulted from the intention of the grantor manifested in the deed, and not from adhering to the literal sense of the words. For after alluding to the English cases, and the case of *Jackson v. Blanshan*, he says, "There being then no doubt that the word 'and' is not confined to the grammatical sense, but may be read as 'or,' so as to put the right of entry in the disjunctive, it only remains to consider whether the plain intent of the grantor was not that it should be so considered. I think this is manifest from the whole instrument." A similar rule is to be observed in the construction of statutes. In *Blackwell's case*, (1 Vern. 152,) it was held that the words of an act of parliament which declared that the chancellor may grant a commission of bankruptcy, was to be construed as imperative; that the word "may" in effect meant "must." In *Rex v. Barlow*, (2 Salk. 409,) it is said that when a statute directs the doing of a thing for the sake of justice, or public good, the word may is the same as shall. (See also *The Newburgh Turnpike Co. v. Miller*, 5 John. Ch. 112; *Malcom v. Rogers*, 5 Cowen, 188.)

This deed, like all similar instruments, is to be construed most strongly against the grantor. "For the principle of self interest will make men sufficiently careful not to prejudice their own interest by using words of too extensive a meaning." (4 Cruise's Dig. 417, § 7.) The words of bargain and sale, granting and conveying, in the present deed, must be held to apply to the several parcels of land therein described, unless they are limited or qualified by subsequent words. The words which are thought to qualify and limit the effect

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of the granting part of the deed are those which immediately precede the description of the premises last described; that is, "The Long Island Rail Road Company may be further entitled to" &c. These are not qualifying words, nor are they words of limitation, in any sense. The most that may be said of them is, that they are inartificial and not the most appropriate to the purpose of granting an estate in lands. But they were put into this deed for some purpose, and to effect some object; and if that appears from an examination of the whole instrument to have been to vest the title in the company, then, upon the rule of construction to which I have referred, the words "may be" can be read "shall be," so that the sentence would read "The Long Island Rail Road Company shall be further entitled to an extra additional width of 70 feet on the south side of the rail road," &c. To declare in a deed of conveyance to a rail road corporation, in the usual form, after the description of one lot by metes and bounds, for the uses and purposes of the road proper, that the corporation shall also be entitled to an additional lot, describing it also by metes and bounds, for the use and purposes of a side track, engine house, depot, &c. would certainly be a very clear and unequivocal manifestation that the corporation should take some interest or estate in the lot last described; for without some estate or interest the company could not apply it to the uses and purposes of the side track, engine house and depot, mentioned in the deed. The quantity of interest and the nature of the estate does not depend upon the words to which I refer, but upon the habendum clause, which I will look at presently. The instrument we are examining is not a contract to convey at a future time. It is a deed of bargain and sale, and nothing else. And if the description of the lot with the words to which I have referred, were not inserted in the deed for the purpose of giving the rail road company a title, it is impossible to say what object the parties had in view; for none other can be attributed to them. In *Doe v. Ashburner*, (5 T. R. 163,) the question

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was whether a particular instrument should operate as a lease, or an agreement for a lease. The particular words were, "He shall enjoy and I engage to give him a lease," &c. Lord Kenyon held that if the former words had not been restrained by the engagement to give a lease in future, they would have operated as a perfect lease; but as the parties agreed, the one to give and the other to receive a future lease, I cannot conceive that this was intended to be a present lease." He says that "whether the particular agreement should be considered a lease, or merely an agreement for a lease, must depend upon the intention of the parties as it is to be collected from the whole agreement. The case cited from *Cro. Car.* was properly decided. There the words were 'the defendant shall have and enjoy,' &c. without any others to qualify the expression. Those words were sufficient to give the legal interest; they would be operative in a bargain and sale or in a covenant to stand seised to uses." (*See also Jackson v. Delacroix*, 2 *Wend.* 433.)

The habendum is resorted to for the purpose of ascertaining the nature and quantity of the estate which the grantee takes in the lands granted in that part of the deed technically known as the premises; for its proper office is to limit the certainty of the estate granted. "Nothing can be limited in the habendum of a deed which is not given in the premises, because the premises being the part of a deed in which the thing is granted, it follows that the habendum, which is only used for the purpose of limiting the certainty and extent of the thing given, cannot increase the gift, for then the grantee would in fact take a thing which was never given to him." (*Cruise's Dig.* vol. 4, p. 432, § 48.) The same observation may be made of the covenant of warranty. Its effect is limited expressly to assure the title of the grantee to the lands granted in the premises of the deed; for it would be absurd to make such a covenant in respect to lands the title to which still remained in the grantor. But both the habendum and the covenant of warranty are material in considering the inten-

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tion of the parties to the deed; for they afford very forcible evidence that it was the intention of the parties to pass the title and make a conveyance *in presenti*. Seeing therefore that we are not to adhere to the literal and grammatical sense of the words which apply to the lot last described in the deed, but that we may ascertain and give effect to the intention of the parties by an examination of the whole instrument; seeing also that by the terms of the deed the company were to take and enjoy the first described lot for the uses of the road proper, and the second described lot for the uses of a side track, engine house and depot, which are the principal uses for which rail road corporations acquire real property, and that whatever was granted in the premises of the deed was by the habendum to be held in fee, with a covenant of warranty, I think it was the intention of the grantors to pass the title to both parcels of land described in the deed, and that such is its legal effect.

The order made at the special term, denying the plaintiffs' motion for a new trial, should be reversed, and a new trial granted, with costs to abide the event.

[ORANGE GENERAL TERM, September 10, 1860. *Lott, Emott and Brown*, Justices.]

LAURA E. BOLTON vs. ERASTUS A. BREWSTER, FREDERICK
ARTHUR, jun. and ANGELINA T. his wife.

Where the record of proceedings before a surrogate, for the proof of a will, shows that the testator, at and immediately before his death, was an inhabitant of the county where the will is proved; that all the necessary parties were properly brought into the surrogate's court, and the witnesses duly examined and their testimony recorded; and that in the execution and publication of the instrument all the requisites of the statute of wills have been duly complied with; it seems the jurisdictional fact of residence will be presumed to have been determined by the surrogate; and that the proceedings before him cannot be attacked and subverted, collaterally, by proof that

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the testator in fact resided in a different county, at the time of his death; for the purpose of destroying the title to real property devised under the will. *It seems* the court will be reluctant to recognize it as a rule of evidence that the residence or habitation of a testator is open to litigation and controversy, long after his will has been proved and admitted to record, and valuable rights have been acquired under it.

After forfeiture and condition broken, the mortgagee, if he be in possession, is considered as having the legal estate, and an action of ejectment cannot be maintained against him.

ACTION to recover the possession of a farm in the town of Hempstead, Queens county.

James C. Bolton, for the plaintiff.

George G. Reynolds, for the defendant Brewster.

By the Court, BROWN, J. The complaint alleges that the plaintiff and the defendant Angelina T. Arthur, as heirs at law of Theodore B. Talmadge deceased, who died intestate, are seised of the premises claimed, and entitled to the possession thereof; and it has no other aspect or claim than to recover such possession with damages for the detention, in the usual form. The answer of the defendant Erastus A. Brewster, among other things, denies that Theodore B. Talmadge died intestate, but says that at the time of his death he left a last will and testament executed in due form to pass real estate, and thereby made and appointed one Philip Burrowes executor thereof, with power to sell his real estate, which power was duly executed by the said Philip Burrowes by a sale and conveyance of the premises in dispute, and under which one Joseph K. Brick, whose tenant the defendant Erastus A. Brewster is, had become and was vested with the title in fee to the lands claimed. The answer also denied the title and seisin of the plaintiff, and claimed that Joseph K. Brick was also entitled to the possession as the owner and assignee of the mortgage, which was due and payable and a lien upon the lands.

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It appeared in evidence that Peter Poillon was seised of the farm on the 29th of January, 1838, and by his deed bearing date on that day the same, with another lot of 16 acres, were duly conveyed to Theodore B. Talmadge, the plaintiff's father. The consideration expressed in the deed was \$10,000, and the conveyance was made subject to the payment of a mortgage, dated August 3, 1835, to secure the payment of \$5000, with the interest, to one George Weeks, upon which there was due at the time of the date of the deed the sum of \$4000. There was also read in evidence a deed of conveyance from Philip Burrowes, sole executor of the last will and testament of Theodore B. Talmadge, deceased, to Horatio Nelson Graves and Erastus Augustus Graves, dated November 21, 1848, for the consideration of \$6500, and was duly recorded in Queens county clerk's office, December 28, 1848, and expressed to be by virtue of the power and authority given to Burrowes, the grantor, by the last will and testament of Theodore B. Talmadge. The lands were also conveyed subject to the mortgage to George Weeks. The defendant proved and produced a regular chain of title under the deed from Philip Burrowes to Joseph K. Brick, his landlord, subject nevertheless to the same mortgage. He also produced and read in evidence the mortgage and bond referred to in the deeds, which was executed by Peter Poillon, junior, to George Weeks, was dated on the 3d August, 1835, and duly recorded in the proper office, September 2, 1835. He also produced a deed of assignment of the same mortgage from George Weeks to Nelson G. Carman, dated July 31, 1852, for the consideration of \$4000, and which was recorded in the proper office, August 2, 1852, wherein it is declared that the bond and mortgage shall not be merged or extinguished, but kept as a subsisting muniment of the title to the mortgaged premises then owned by the assignee of such mortgage, with all the usual remedies under the same. There was also produced and proved upon the trial, a deed of assignment of the same mortgage and bond, from Nelson G. Carman to Joseph

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K. Brick, the defendant Brewster's landlord, dated March 11, 1858, for the consideration of one dollar, with a declaration in the deed of assignment similar to that in the deed from George Weeks to Nelson G. Carman. There was also offered in evidence by the defendant, upon the trial, an exemplified copy of the proceedings and proofs taken before the surrogate of the county of New York, admitting to probate and record an instrument in writing alleged to be the will of Theodore Talmadge, and the record of the will and letters testamentary issued thereon. The counsel for the plaintiff objected to the evidence as inadmissible, alleging amongst other grounds, the want of jurisdiction in the surrogate of New York to take the proof of the will. The objection was overruled and the plaintiff excepted. The papers were then read in evidence, consisting of the petition of Philip Burrowes, setting forth the making of the will, the death of the testator and the names of his widow and her two infant children, the said Laura and Angelina. That the deceased was, at or immediately previous to his death, an inhabitant of the city of New York, and praying that the will be proved and letters testamentary thereon issued to the petitioner. The petition is sworn to before a commissioner of deeds of the city of New York. The record then contains the usual order for the issuing of process, the consent of Isaac Fitz to become the guardian of the two infant heirs, the order appointing him as such guardian, the citation, with an affidavit of service thereof on Mary Ann Talmadge, the widow, by Joseph G. Taylor, the brother in law of the deceased, and an entry that Isaac Fitz, the special guardian, appeared and attended upon the proof of the will. Also the copy of the will with the affidavits and testimony taken by the surrogate, with the orders for recording of the will as a will of real and personal estate, and establishing the same as a valid will, and admitting the same to probate with the letters testamentary. These orders were made on the 28th of May, 1841. This copy of the record is certified and exemplified in the usual form to entitle the same to be read

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in evidence. The will bears date April 13, 1839; appoints Philip Burrowes the executor, with a devise and power to sell, in the following words: "And for the purpose of enabling my executor to carry into full effect the intent and provisions of my said will, I do hereby convey and vest in him all my said estate and property of every kind, with full power and authority to sell, convey, assign, collect, satisfy, discharge, invest and reinvest the same and the proceeds thereof, in his best judgment and discretion, for the benefit of my wife and children as aforesaid." It was also proved that the testator died January 17th, 1841, at Hudson in the county of Columbia, and the proof also tended to show that he resided there with his family about five months immediately preceding his death. The circuit judge, upon this evidence, directed the jury to find a general verdict for the defendant Brewster, and also to find that Theodore B. Talmadge, at the time of his death and for five months immediately previous thereto, resided in the city of Hudson, Columbia county and state of New York; which fact was found and verdict rendered accordingly. To that part of the instruction which directed a general verdict in favor of the defendant Brewster, the plaintiff's counsel excepted, and thereupon the exceptions were ordered to be first heard at the general term and judgment there given.

In itself the record of the proof of the will appears to be complete. It shows that Theodore B. Talmadge, at and immediately before the time of his death, was an inhabitant of the city of New York where the will was proved. That all the necessary parties were properly brought into the surrogate's court, the witnesses duly examined, and their testimony recorded. It also shows, that in the execution and the publication of the instrument all the requisites of the statute of wills had been duly complied with. And but for the evidence aliunde we should, without any hesitation, adjudge that the defendant, Erastus A. Brewster, was entitled to hold the premises under the title derived from Philip Bur-

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rowes the executor. The plaintiff, however, insists, and the jury have found as a fact in the case, that Theodore B. Talmadge was at and for five months previous to the time of his death, an inhabitant of the city of Hudson, and therefore could not have been at that time an inhabitant of the city of New York. Should we conclude—as I think we safely might—that upon the authority of *Conklin v. Edgerton*, (21 *Wend.* 430,) and *Newton v. Bronson*, (3 *Kernan*, 587,) Burrowes had authority to convey the land as the donee of a power in trust, and not as executor under the will, and that letters testamentary were not indispensable to the due execution of the power, we should still encounter the question upon which the plaintiff relies, to wit, the authority and jurisdiction of the surrogate of the city of New York to entertain the proceedings to prove the will. It is a necessary link in the defendant's chain of title upon this branch of the defense, and there is no proof of its execution and publication but that contained in the record and proceedings had before that officer. "The surrogate of each county shall have sole and exclusive power within the county for which he may be appointed, to take the proof of last wills and testaments of all deceased persons in the following cases: 1st. When the testator at or immediately previous to his death was an inhabitant of the county of such surrogate, in whatever place such death may have happened." (2 *R. S.* 60, § 23.) The surrogate's jurisdiction is exclusive, and the testator must have been an inhabitant of the county where the will is proved, at or immediately previous to his death. In the record and proceedings before the surrogate of the city of New York, it is distinctly alleged in the petition, which is sworn to, that Theodore B. Talmadge, at or immediately previous to his death, was an inhabitant of the city of New York. This jurisdictional fact is one which was open to litigation and which the surrogate might try and determine, and doubtless did determine, in these proceedings. It now becomes a grave question whether the proceedings can be attacked and subverted collaterally, for the purpose of

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destroying the title to real property devised under the will. Domicil, residence, and inhabitancy, depend upon acts coupled with intention, which it is not always easy to ascertain, and the courts will be reluctant, I think, to recognize it as a rule of evidence that the residence or habitation of a testator is open to litigation and controversy long after his will has been proved and admitted to record, and valuable rights have been acquired under it. In the present case, it would be a useless task to endeavor to reach any definite conclusion upon this question, for an adjudication favorable to the views entertained by the plaintiff, would not overcome or evade another impediment which lies in the way of her recovery.

The defendant claims title to the premises under the deed from Philip Burrowes, as also under the mortgage made by Peter Poillon to George Weeks. Theodore B. Talmadge took the deed from Peter Poillon subject to this mortgage, and upon which there was then due the sum of \$4000, and interest from the time of the date of the deed to him. George Weeks assigned the mortgage to Nelson G. Carman, who afterwards assigned the same to Joseph K. Brick, the landlord of the defendant, Erastus A. Brewster. This mortgage has never been paid or satisfied, but is now a subsisting lien upon the lands claimed, and is held for the purpose of assuring and protecting the title. Whatever may be the effect of the deed executed by Philip Burrowes under the power contained in the will of Theodore B. Talmadge, the relation of the defendant to the premises is that of mortgagee in possession. After forfeiture and condition broken, the mortgagee, if he be in possession, is considered as having the legal estate, and an action of ejectment cannot be maintained against him. Whatever rights the plaintiff may have to these lands, it is quite clear she is not now entitled to recover the possession. (*Phyfe v. Riley*, 15 Wend. 248. *Van Dwyne v. Thayer*, 14 id. 233.) Judgment should be entered for the defendant.

[ORANGE GENERAL TERM, September 10, 1860. *Lott, Emott and Brown*, Justices.]

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To render a demand and refusal to deliver goods equivalent to direct proof of a conversion, it must appear that the party had the actual possession, at the time of the demand, and thus had power to comply with it; or that he had, before that time, parted with the goods fraudulently, with a view to evade the demand, or for his own benefit.

If, at the time the demand is made, the goods are in the actual possession of another, and the person of whom the demand is made has not, and never had, any control over them, the fact that he claims the goods, and declares they are his own property, will not amount to a conversion.

Nor will the fact of his giving an undertaking, to prevent the delivery of the property by the sheriff, to the plaintiff in an action brought to recover the possession, operate as an estoppel *in pais*.

A PPEAL from an order made at a special term, granting a new trial.

S. D. Lewis, for the plaintiff.

D. T. Walden, for the defendant.

By the Court, BROWN, J. The plaintiff recovered a verdict in this action for the sum of \$5000, the value of the goods claimed in the complaint, and for \$281.96 damages, at the Kings circuit before Mr. Justice LOTT, which was afterwards set aside at the special term, on motion of the defendant, and thereupon the plaintiff appealed.

The action is brought to recover the possession of certain bundles of telegraph wire shipped from London, by the plaintiff, to one Sherman Webster, in New York, in October, 1856. The defendant claimed the property as owner, by purchase from Webster on credit. The title of the plaintiff to the property is by no means free from doubt; for portions of the evidence tends to show that Webster and Andrews, the plaintiff, were joint owners, while the invoice of the goods and the letters and correspondence of the plaintiff tended to establish a sale from him to Webster, the receiving of the notes

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of the latter in payment, and the giving of a receipt in full. The jury, however, by their verdict, found the title to the goods to be in the plaintiff, and that Webster had no authority to sell upon any other terms but cash. If there were no other impediment in the way of the plaintiff's right to retain the verdict, it would become a serious question how far it could be disturbed under the conflicting proof upon which it was rendered. The circumstance disclosed by the proof, however, suggests another consideration, fatal, I think, to the plaintiff's right to maintain the action.

It is not claimed that the defendant took these goods tortiously. The most that the plaintiff asserts is that they were consigned to Sherman Webster to sell for cash, for the benefit of the plaintiff, and that Webster, in disregard of his instructions, made the sale to the defendant and received his paper in payment, payable on time. This theory implies that the goods came to the possession of the defendant by delivery from the plaintiff's agent who had authority to sell and deliver. This state of things imposed upon the plaintiff the burden of proving a conversion by the defendant. This he attempted to do; for he proved that he demanded the goods from the defendant before the commencement of the action, and the defendant failed to deliver them. To render a demand and refusal equivalent to direct proof of a conversion, it must appear that the defendant had the actual possession at the time of the demand, and thus had power to comply with it; or that he had before that time parted with the goods fraudulently with a view to evade the demand, or for his own benefit. It is an undisputed fact in the case that the goods were seized by the collector, under the revenue laws of the United States, as they entered the port of New York, under a claim that they were forfeited in consequence of a fraudulent undervaluation in the invoice. That an action for their condemnation was immediately commenced in the United States district court. That the goods were taken under the process of the court, by its proper offi-

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cer, and retained in his custody until the termination of the litigation, which was some time after the commencement of this action. The defendant, therefore, upon this state of facts, never had the possession of the goods, and could not be guilty of a conversion, either actual or constructive. Never having had them under his control, he could not deliver them upon demand of the plaintiff, supposing him to have been the true owner; nor could he part with them to another person, either fraudulently or otherwise. The proof that he claimed the goods, and declared they were his own property, was of no avail, in the face of the fact that they were then, and had been from the time they came to this country, in the actual possession of another. And so also with regard to the giving of the undertaking by the defendant to prevent the delivery of the property by the sheriff to the plaintiff, when the action was commenced. It cannot operate as an estoppel *in pais*; for it lacks some of the essential qualities of such an act, and as proof of the conversion it is overcome by the proof of the actual possession by the United States officer.

The order appealed from should be affirmed, with costs.

[ORANGE GENERAL TERM, September 10, 1860. *Lott, Emott and Brown*, Justices.]

WILLIS vs. THE LONG ISLAND RAIL ROAD COMPANY.

The extent and the measure of the duties and the responsibilities of a carrier of passengers and the passenger are quite different. The carrier is bound to the exercise of all possible skill, foresight and care. The passenger is bound to conduct himself with due and ordinary prudence, such as a careful man would use under the circumstances. He is not required to foresee unexpected dangers, nor to speculate upon risks, but he is obliged not to expose himself to danger which is known or may be looked for, in a manner inconsistent with ordinary caution. *Per Emott, J.*

It is not conclusive evidence that a person is negligent of his safety in assuming

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a particular position, that, had he not been in that place or in that position, he would not have been injured. *Per* EMOTT, J.

It is not negligence in a passenger to occupy a position which will involve increased risk to him of the consequences of negligence and misconduct of the carrier.

A passenger neglects his duty when he does not guard against the risks which he knows to be ordinarily incident to the mode of travel which he employs; but he cannot be charged with such a neglect for omitting to provide against the possible consequences of the misconduct of the carrier.

The fact that a passenger upon a rail road is standing upon the platform of a car when he receives an injury by means of a collision of cars, occasioned by the negligence of the rail road company or its agents, will not, of itself, independent of the provisions of the general rail road act of 1850, bar his recovery of damages for the injury sustained.

The 46th section of the general rail road act applies to a case where, although the casualty resulted from serious neglect of their duty by the rail road company, yet it proved dangerous or injurious only to those who were exposed by being upon the platform of the car in violation of the printed regulations of the company.

The "proper accommodation" which, by that section, rail road companies are required to furnish to passengers, implies not only space enough, within the cars, to contain the passengers, but also the means of sitting, in the usual manner, during the journey.

A rail road company, to entitle itself to the protection of the statute, in case of injury to a passenger while upon the platform, is bound to show that it furnished not only room in the cars, but *seats*. If there are no vacant seats, a passenger is not chargeable with fault, nor exposed to the statute, for remaining on the platform.

The fact that there are no vacant seats in the car which a passenger enters, will not justify him in going upon the platform, provided there are accommodations in the other cars of the train, and there is sufficient time and opportunity for the passenger to go where there are seats, before the train starts.

But a passenger is not bound to go from one car to another, in search of a seat, after the train has started.

Neither is a passenger bound to require a person occupying an entire seat to make room for him, nor to displace him so as to obtain a seat, though the seat be large enough for two persons to occupy when sitting properly.

Nor is it the duty of a passenger, with reference to the requirements of the general rail road act, to require persons to displace articles which they have placed upon a seat, in order that he may be seated.

Rail road companies are bound to furnish the accommodations mentioned in the statute—the room and the seats—and not merely to furnish passengers with the means of obtaining them.

They have a right to make regulations as to the use of the seats, and the

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power to enforce them, and it is the duty of their servants and agents to provide seats for passengers, without waiting for any application from the latter.

APPEAL from an order made at a special term, denying a motion on the part of the defendants to set aside a verdict, and for a new trial. The plaintiff, by his complaint, sought to charge the defendant, in damages, for injuries sustained by him while riding upon the cars of the defendants; and also for loss of his son's services, &c. occasioned by injuries to his son at the same time, and by the same accident. The plaintiff and his son, Benjamin Willis, (a minor,) were passengers on a train of cars on the defendants' road, in September, 1857. They got upon the train at Hempstead Branch, after it had started from the depot, and upon the *front* platform of the *first* passenger car. It was a long train, comprising tender, baggage-car, and six passenger cars. The plaintiff and his son passed into the first car, went about *half way* through it, saw no vacant seats, then returned to the front platform of the car. There were vacant seats in the car, also plenty of standing room. There were also vacant seats in the other cars. There were six passenger cars. Each car would seat from 60 to 62 or 64 passengers. There were only 209 passengers on the train besides a military company, which numbered 36 or 37—in all 245 or 246. Some seats were occupied by light baggage, belonging to the passengers, and in a few instances two seats were occupied by one person. The train was about on its regular time, and remained at Hempstead Branch station the usual time. Soon after leaving Hempstead Branch the engine and baggage-car were thrown from the track. The *first* passenger car was partially broken. No other cars were injured. The accident was caused by poles lying across the track. The engineer's view of the obstruction was intercepted by laborers on the track until too late to avoid the accident. As soon as the obstruction was discovered a signal to brake up was given, the brakes were applied, the engine reversed, the speed of the

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train very much checked, and the concussion caused by the accident was very slight. At the time of the accident the plaintiff was standing on the front platform of the first passenger car, and his son just inside the door opening upon the platform. No persons except plaintiff and his son were injured. Notices like the following were posted in conspicuous places inside of each passenger car in the train: "Notice. Passengers are notified not to put their heads or arms out of the windows, and not to stand upon the platforms of the cars." The plaintiff had very frequently traveled over the defendants' road, and had seen the notices posted in the cars.

The defendant, by its answer, among other defenses, insisted that the carelessness and negligence of the plaintiff contributed to the injuries sustained by him; that at the time of the accident there were certain printed regulations of the company, posted up in the passenger cars, notifying passengers not to stand upon the platforms; that there was a sufficiency of seats for the accommodation of all the passengers; that in disregard of the said regulations and without the defendant's permission, the plaintiff stood upon the platform of the car, while the train was in motion, and was so standing thereon at the time of the accident; and the defendant claimed that by reason of the premises and under and by virtue of the general rail road act, (as amended,) they were not liable for any damages sustained by the plaintiff. The action was tried at the Queens county circuit, before a jury; who found a verdict in favor of the plaintiff, for \$3100 damages.

Weeks & De Forest, for the appellant.

W. H. Onderdonk, for the plaintiff.

By the Court, EMOTT, J. There can be no serious question as to the negligence of the defendants in respect to the occurrence by which the plaintiff was injured. The engine and

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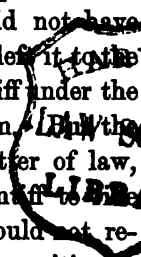
baggage car of the train in which he was riding were thrown from the track by some poles or pieces of wood or timber which were lying upon the track, and which may fairly have been inferred to have fallen from a previous train, which had been in part loaded with such poles or sticks of timber. It was a question whether the engine driver could not, and ought not, to have seen this obstruction in time to have checked the train and prevented a collision with it. But if this were not so, it would not have required a very great or unusual exercise of care on the part of those having charge of the road and the trains, either to have prevented these things falling from a train while in motion, or to have replaced them if they did fall off; or to have removed them from the track; or to have discovered their presence and warned an approaching train in season to prevent any injurious consequences. A sufficient number of men upon the train from which the poles escaped, or a force of watchmen upon the track to examine and to keep it clear, would have sufficed to prevent the collision which injured the plaintiff. Such precautions, however expensive or onerous, are far from being beyond the reach of human skill and foresight, and that is the only limit of the duty of a carrier to provide for the safety of his passengers.

The principal question in the case is whether the plaintiff was guilty of negligence. The rule is that a plaintiff cannot recover for an injury which he has sustained in consequence of the negligence of a defendant, if his own negligence contributed to produce the injury. The court of appeals, in a very recent case, *Colegrove v. New York and New Haven and N. Y. and Harlem Rail Road Companies*, (20 N. Y. Rep. 492,) have intimated that they do not sanction a construction of this rule which requires that the negligence of the party injured, in order to excuse the carrier, must be such as to contribute to produce the collision which occasioned the injury. The judge who makes this intimation does not, however, explain what the court consider to be the true construction of the rule, and the effect of the decision or of the opinion

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will not be, I apprehend, to remove any difficulty which may be presented by such cases. A contrary decision had generally been supposed to be involved in the affirmance of the judgment in *Carroll v. New York and New Haven Rail Road Co.* (1 *Duer*, 571.)

The extent and the measure of the duties and the responsibilities of the carrier and the passenger are quite different. The carrier is bound to the exercise of all possible skill, foresight and care. The passenger is bound to conduct himself with due and ordinary prudence, such as a careful man would use under the circumstances. He is not required to foresee unexpected dangers, nor to speculate upon risks, but he is obliged not to expose himself to danger which is known or may be looked for, in a manner inconsistent with ordinary caution.

In the present case the defendant was upon the platform of the car when the locomotive went off the track. The car upon which he was riding was brought in contact with the baggage car before it, and partly crushed. The plaintiff, who was on the platform, and his son who stood just within the door, were the only persons injured. It is extremely probable that if the plaintiff had not been upon the platform he would not have been injured; certainly he could not have been injured so seriously as he was. The judge left it to the jury to say whether it was negligence in the plaintiff under the facts disclosed, to stand or ride upon the platform. The defendants contend that it was negligence as matter of law, or at least beyond dispute as a fact, for the plaintiff to be upon the platform, and that for this reason he could not recover and should have been nonsuited. This proposition is rested not merely upon the statute, to which I shall refer presently. It is also contended that independent of the statute, the plaintiff could not recover for an injury which befell him under these circumstances.

It is not conclusive evidence that a person is negligent of his safety in assuming a particular position, that if he had

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not been in that place or in that position he would not have been injured. That, as a general rule or proposition, would go too far. A collision may destroy a particular portion of a car, the middle or one end it may be, and only those occupying that portion will be injured. It might be said, in such a case, that if the passenger had not occupied the seat which he did, he would not have been injured. Yet no one would impute negligence to a person for occupying one seat more than another, although it may be as certain that he would have escaped uninjured if he had not occupied that seat, as it can be in this case that the plaintiff would not have been injured if he had not been standing on the platform.

The essential element of negligence, in such a case, is a disregard of some risk which the passenger ought to anticipate. If a man places himself in such a position that in the ordinary movement and conduct of the train he is exposed to danger, he may justly be said to be negligent of his security, and must take the consequences if he is injured. If he attempts to leave or to get in a train in motion; or if he places his limbs or his body where they may be crushed between two cars in their ordinary movement and jostle, and is hurt in consequence, he is guilty of a fault which is an essential cause, if not the only cause, of his injuries, and although the cars may have been carelessly started or carelessly run, it does not help his case.

If the plaintiff in this case had been thrown off the platform by a jerk or movement of the train, he would have encountered a danger incident to his position, and although the jerk might have been occasioned by high and unusual speed or other mismanagement, still, at the most, the fault would have been mutual. But he was injured by a collision between two cars of the train, resulting in the crushing of one of them, which was occasioned by the engine running off the track in consequence of the marked, if not gross negligence of the defendants or their agents. Now to say that it was negligence in the plaintiff to occupy a position in which he had reason

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- to fear that he would be more exposed to injury from such a cause, it is necessary to say that he was bound to foresee and to protect himself against such a danger. It is not negligence for a man to ride on a platform of a car because he is more likely to be injured there in case a collision occurs, unless he is under obligations to ride where he will be most safe in case a collision does occur. But I think a passenger is not bound to anticipate a collision, or that the train will be thrown from the track. He has a right to expect that he will be carried safely, that the carrier will discharge his duty, will provide a safe vehicle and an unobstructed track, and that the passengers will be exposed to no risk but those incident to that mode of travel. It is not in my judgment negligence in a passenger to occupy a position which will involve increased risk to him of the consequences of negligence and misconduct of the carrier. We might as well say that it is negligence for a man to stand or sit near a boiler on a steamboat, because in case the carelessness of the managers produces an explosion, he is more likely to be killed. A passenger neglects his duty when he does not guard against the risks which he knows to be ordinarily incident to the mode of travel which he employs, but he cannot be charged with such a neglect for omitting to provide against the possible consequences of the misconduct of the carrier.

I am therefore of opinion that the fact that the plaintiff was upon the platform of the car when he was injured does not of itself, independent of the statute which I will proceed to consider, bar his recovery of damages for his injuries.

Section 46 of the general rail road act, (*Laws of 1850, ch. 140*), provides that "in case any passenger shall be injured while on the platform of any car in violation of the printed regulations of the company posted up at the time in a conspicuous place, inside of its passenger cars then in the train, such company shall not be liable for the injury, provided the said company at the time furnished room inside its passenger cars sufficient for the proper accommodation of its passengers."

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It was proved that the defendants had printed regulations, forbidding passengers to stand on the platform, posted up in the cars on this train. I think the statute was intended to reach all cases of injuries, whether occasioned by great negligence of the carrier or otherwise, provided the injury was occasioned or increased by the exposed position which the passenger occupied. At all events it must, I think, apply to a case like the present, where although the casualty resulted from serious neglect of their duty by the defendants, yet it proved dangerous or injurious only to those who were exposed as the plaintiff and his son.

The question upon this part of the case is whether the defendants furnished "sufficient accommodation" within "the cars" according to the meaning of the statute. Accommodation means more than room. Sufficient accommodation means room enough to receive the passengers, together with a supply of the conveniences requisite for their comfort, customary in the particular mode of travel. In the case of rail road cars it implies not only space enough within the cars to contain the passengers, but also the means of sitting in the usual manner during the journey.

The judge charged the jury at the trial, substantially, that in order to entitle themselves to the protection of the statute, it was incumbent upon the defendants to furnish not only room in the cars, but seats, and that if there were no vacant seats the plaintiff was not chargeable with fault, nor exposed to the statute, for remaining on the platform. I think this is the true construction of the statute, and that the instruction given to the jury upon this point was correct.

It was contended that although the first car of the train into which the plaintiff and his son entered was full, yet there were vacant seats in other cars which they might and ought to have taken. The evidence went to show, and the jury had a right to believe, that the train made a short stoppage at the station where the plaintiff got upon it, and that he was obliged to make some exertions to get his lug-

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gage upon the train, and get in the cars himself before they left the station. There was no evidence that any one connected with the train or the road pointed out either car in particular to the plaintiff, and I see no foundation for the proposition that he should have known or believed that this car would be full, and should have ascended some other car, and that therefore the defendants were not bound to furnish accommodations in that car. The premises are not true, and the conclusion does not follow from them. Nor does the plaintiff's getting upon this car while it was in motion, affect in any way the present question. He was not prevented from finding a seat by getting upon the train while it was in motion. If he did so it was because he was unable to have his luggage secured before the train started. The plaintiff's injuries or their occasion had nothing to do with the time or the manner of his getting on the train. There was but one point of view in which these facts were material, and the law upon that point was correctly laid down by the court. The judge said to the jury that if the plaintiff and his son had sufficient time after they entered the first car, if they found no seats there, to go through the other cars and obtain seats, the plaintiff should not recover. That if there were accommodations in the other cars, and there were sufficient time and opportunity for the plaintiff to go there before the train started, he had no right on the platform. But he was not bound to go from one car to another after the train had started. This instruction was correct upon all the points which it embraced, and was all to which the defendants were entitled.

The points which have now been adverted to are sufficient to dispose of all the exceptions in the case which require to be noticed, except one upon a question of evidence, and certain exceptions to the charge, which present a question as to the respective duty of the plaintiff and the defendant's employees, in regard to seats intended for two persons which were occupied by one, and seats which were filled with luggage.

As to the evidence which was objected to, it is sufficient to

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say that the witness's attention was called distinctly to the time and place at which he made the statement about which he was interrogated, and the person who heard it. The witness who swore to the statement did not personally remember and indentify the engine driver who made it. He had no acquaintance with him, but he stated positively that the statement which he heard, and was asked to repeat, was made by the person in charge of the engine, and the proof was undisputed that this was the witness Casey.

There was evidence given by the defendants that in the car which the plaintiff entered, there was one seat occupied by a person reclining in such a manner as to prevent any other sitting upon it, unless he was removed or made to change his position. There was also evidence that another seat not occupied by passengers, was filled with articles belonging to two persons who sat upon an adjoining seat. The judge told the jury in reference to these seats, that the plaintiff was not bound to require a person occupying an entire seat to make room for him, nor to displace him so as to obtain a seat, though the seat were large enough for two persons to occupy when sitting properly. He also said that it was not the duty of a passenger, with reference to the statute to which I have referred, to require persons to displace articles which they have placed on a seat, that he might be seated. To this the defendants excepted. They afterwards requested the judge to charge that a passenger who finds seats occupied by baggage or other articles of other passengers, which prevent him from taking part of it, should, if there be no other vacant seats, apply either to the passengers so encumbering the seats with baggage, or to the conductor to have them removed. The judge declined so to charge and the defendants excepted.

It will be remembered that the question to which this evidence and these instructions are to apply, is upon the duty of the defendants, not that of the plaintiff. The question is not precisely whether the plaintiff was guilty of negligence,

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but whether the defendants furnished sufficient accommodations in their car for his use. At common law, and independent of this statute, as we have seen, the plaintiff was not in fault, and could have recovered damages for his injuries under the circumstances of this collision, notwithstanding he was upon the platform of the cars. The statute interposes an obstacle to his recovery because he was upon the platform, if the defendants had provided proper accommodations for him in the cars. This statute is for their benefit, and they must bring themselves strictly within it. They are to furnish the accommodations, the room and the seats, and not merely to furnish passengers with the means of obtaining them. They have the control of the cars, their construction and their use. They may and do make regulations as to the use of the seats, the number of persons who may occupy them, and their use for articles of baggage, and whether such articles shall be permitted in passenger cars, or must be placed in the baggage car. They have conductors and servants upon the train to enforce these regulations, and to provide seats for passengers. The conductor of this train passed the plaintiff and his son, saw where they were standing and received their fare, a short time before the collision occurred. He knew or ought to have known the condition of these seats, and it was his duty to have cleared them, if they were improperly occupied, and to have provided seats for persons who were standing either within or without the car. It was his duty and that of his assistants, if he had any, to do this for the comfort and convenience of the passengers, as well as to comply with the statute, which was to protect the defendants in case of a collision or other damage to the train. It was not a compliance with the statute that the defendants would have provided a seat for the plaintiff if they had been requested to do so. They were bound to furnish seats without request, and as a part of their duty. They were not to be passive until requested to act, but an active duty rested upon them. If they had rules which required that these seats

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should be vacated they should have enforced them, and made room for the plaintiff, so that he could see that he could be seated. The duty rested upon them absolutely to furnish suitable accommodations, and the plaintiff was not called upon to set them in motion to do their duty.

It may be added that the proposition asked for by the defendants went too far. As an abstract or general proposition it is liable to the objection that the conductor might not be in the car, or the passenger might not have an opportunity of applying to him. In reference to the special facts disclosed in this case, it will be seen that the conductor passed the plaintiff, received his fare, and must have noticed, if he was not bound to know, not only that the plaintiff was on the platform, but that it was in his power to furnish him seats within the car.

We think the true rule upon this point is what has now been indicated, and therefore that the judge's rulings were correct.

The order denying a new trial must be affirmed with costs.

[ORANGE GENERAL TERM, September 10, 1860. *Lott, Emott and Brown, Justices.*]

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KELSEY vs. KING and others.

A property owner cannot invoke the equitable interposition of the supreme court for any omissions or irregularities in the proceedings of a municipal corporation to open a street.

He may review them by certiorari; or he may put in issue the title of the public authorities of the city to enter upon his lands, by a common law action, which will bring up the regularity of the proceedings to open the street; but he cannot test their effect upon his title by an equitable action. Nor is he entitled to an injunction, to restrain the construction of a sewer, by persons contracting with the corporation, on the ground of a defect in the form, or in the parties to, the contract.

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Under the 8th section of the act of April 15, 1857, in relation to sewerage and drainage in the city of Brooklyn, and the acts amending the same, which declares that should the commissioners, in devising a system of drainage for the entire city, "find it *necessary* to construct a sewer through any street or avenue not opened by law, and such sewer cannot be constructed so as properly to drain any portion of the city, without carrying the same through such unopened street, or avenue," it shall then be lawful for the commissioners to apply to the supreme court, and institute the usual proceedings to open the street, the commissioners are to exercise their own *discretion* as to the sewers, and the location of them, which are to constitute an efficient system of sewerage for the city.

The words used in that section do not indicate an intention, on the part of the legislature, that the unopened streets shall not be appropriated to the uses of the sewerage system unless it is physically *impossible* to conduct the sewerage through the streets already opened to public use; so as to make an *absolute necessity* the condition upon which the commissioners can apply to open a street.

The appropriation of land to the uses of a public street, in a city, in conformity with the statutes and the constitution, confers the right to appropriate it to the uses of constructing a *sewer* devoted to conducting away the impurities and surplus waters collected from portions of the city, without compensation to the owner.

The two uses of land—for a street and for a sewer—are not inconsistent and different; the use for a sewer being incidental to, and within, the use for a public street; and both contributing to benefit the adjoining property.

There is a distinction between an appropriation of land to a rail road company, for the use of its road, and an appropriation thereof for the uses of a public sewer, in a city; the former being for the exclusive profit of the stockholders in the company, and the latter, for the benefit of the public at large; and a rail road being an impediment and an obstruction above, and upon the surface of the street, of the most serious and dangerous character; while a sewer lies below the surface of the street, forms no obstruction, makes no noise, and creates no danger. *Per Brown, J.*

When a sewer is constructed, through a street already opened to the public, it takes nothing away from the owner of the adjoining land. He suffers no detriment, and no injury, and should the law provide a mode of awarding him compensation, it would be a nugatory provision; for he parts with nothing of value. *Per Brown, J.*

The right to construct the necessary sewers, in the public streets of a city, to remove and conduct away the impurities which collect therein, to the prejudice and peril of life and health, as well as from the adjoining lots, must from necessity, exist as a right incident to the use of a street..

A PPEAL from an order of the city court of Brooklyn, dissolving an injunction.

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Winchester Britton, for the plaintiff.

Alexander MoCue, for the defendants.

By the Court, BROWN, J. The plaintiff is the owner in fee of lands in the city of Brooklyn, over and through which Butler street, sometimes called Harrison street, had heretofore been laid out, but not opened for use under the usual proceedings for that purpose. The defendants, Gamaliel King, John H. Frink, Daniel L. Northrop and William B. Lewis are the commissioners of sewerage and drainage in the city of Brooklyn, under the act of the 15th April, 1857, and the act amending the same, concerning sewerage and drainage in such city. The defendants, William Kinny and John R. Halliday, are contractors with the commissioners to open a sewer in Butler street. The plaintiff filed his complaint in the city court, and, upon the grounds to which I shall refer, obtained an injunction restraining the defendants from proceeding to construct the sewer. The injunction was afterwards dissolved, upon motion, with the condition that should the plaintiff appeal within three days and take short notice of argument, the order should not take effect until the decision of the general term of this court. The plaintiff appealed, and hence we are to determine whether the plaintiff is intitled to the injunction, which is the principal object of the action.

To enable the commissioners to construct the sewer they instituted proceedings under the 8th section of the act, and presented a petition to this court for the appointment of commissioners of estimate and assessment. They were appointed and entered upon the execution of the duties of their office. They made their report, which was duly confirmed at the special term of this court, the plaintiff being heard, in opposition thereto. One of the grounds upon which he now asks the injunction is the neglect of the commissioners to comply with certain requisites of the statute in regard to

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opening streets, and in particular that the notice of the application for the appointment of commissioners of estimate and assessment did not specify the district of assessment. It is an answer to this, as it is to all similar objections, that the plaintiff cannot invoke the equitable interposition of the court for any omissions or irregularities in the proceedings to open the street. He may review them by certiorari, or he may put in issue the title of the public authorities of the city to enter upon his lands, by a common law action which will bring up the regularity of the proceedings to open the street; but he cannot test their effect upon his title by an equitable action.

Another ground upon which he claims the injunction is an informality in the form, or rather in the parties, to the contract with the defendants, Kinny and Halliday, to construct the sewer. The contract is made in the name of the city of Brooklyn. If a contract made in this form should be deemed illegal, the plaintiff is not in a condition to impeach it, or put its validity in question. He is but one of a multitude of the inhabitants and tax-payers of the city, and has no standing in court to litigate in regard to it.

He next asserts, as a ground of his application, the want of all necessity for a sewer in Butler street, and claims the existence of such necessity as a condition precedent to the application to open the street. The act is designed to furnish a system of drainage for the entire city, and requires the commissioners to devise and frame a scheme for the whole city upon a regular and systematic plan, so as to remove the surplus water and the superabundant filth from every part of the city. The object is its purification, and the better health, happiness and convenience of its inhabitants. Such a scheme, it is evident, must have reference to the formation of the ground, its level in various places, with a view to the descent of the waters to be removed, and the communication of the principal sewers with the tide waters into which their contents are to be poured. The 8th section of the act de-

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clares that "should the commissioners, in devising such a plan, find it necessary to construct a sewer through any street or avenue not opened by law, and such sewer cannot be constructed so as properly to drain any portion of the city without carrying the same through such unopened street or avenue," it shall then be lawful for the commissioners to apply to the supreme court and institute the usual proceedings to open the street. The argument of the plaintiff is that the word necessary, as used in the section, and the words, "and such sewer or drain cannot be constructed so as to properly drain any portion of said city without carrying the same through such unopened street or avenue," indicate an intention that the unopened streets should not be appropriated to the uses of the sewerage system, unless it was physically impossible to conduct the sewerage through the streets already opened to public use. And thus the absolute necessity would become the condition upon which the commissioners could apply to open a street. Such a construction is not reasonable, for it takes away much of the discretion of the commissioners in the location of the works, and limits and restrains their powers of action, so that a liberal, comprehensive and efficient system of drainage cannot be accomplished; no matter what impediments the commissioners may encounter; no matter what may be the cost and the time required to remove them. Unless these impediments are of such a character that they cannot be removed, their powers are limited to the streets already opened to the public use. The words of the section, in case the commissioners "in devising and framing a plan of sewerage and drainage, find it necessary" to conduct a sewer through an unopened street, and the words "properly drain any portion of said city," which follow almost immediately thereafter, show that the commissioners were to exercise their own discretion as to the sewers, and the location of them, which were to constitute an efficient system of sewerage for the city. The idea of devising and framing a system of sewerage for a large and

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growing city, which are the trusts confided to the commissioners, implies a large measure of discretion, for without it they could not be beneficially executed.

The counsel for the plaintiff also contends that the appropriation of the land to the uses of a public street in conformity with the statutes and the constitution conferred no right to appropriate it to the uses of constructing a sewer devoted to conducting away the impurities and surplus waters collected from portions of the city, without compensation to the owner. This presents the question whether the uses are not inconsistent and different; or whether the use for a sewer is not incidental to and within the use for a public street. The case of *Williams v. The New York Central Rail Road Co.* (16 N. Y. Rep. 97,) is distinguishable from the present, in most of its features. There the dedication was for a street over and through the lands of the plaintiff, and the appropriation had been made to a rail road corporation operating its cars and engines by steam, at the rate of 40 trains each day along the lands of the plaintiff, for the exclusive profit of its stockholders. In the present case the appropriation for the uses of a sewer is for the benefit of the public at large. A rail road, with numerous trains of cars thereon, is an impediment, an obstruction above and upon the surface of the street, of the most serious and dangerous character. A sewer lies below the surface of the street, forms no obstruction, makes no noise and creates no danger. A rail road operated by steam in the streets of a city is a positive injury to the adjoining property, and deteriorates its value. A sewer properly constructed in the center of a public street, is positively beneficial to the adjoining property, and enhances its value. The court of appeals, in the case referred to, adjudged that the two uses—the one for a highway and the other for a rail road—were inconsistent with each other, the latter use nearly superseding the former. That the land was subjected to a double easement. That the dedication of land to the use of a public highway is not a dedication to the use of a rail road

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company. That the two uses are essentially different; and that consequently a railway cannot be built upon a highway without compensation to the owner. Now the uses of a public street in a city, and a sewer in the center of the street, are not inconsistent with each other. They are not different. They are in harmony; both contributing to benefit the adjoining property. When a sewer is constructed through a street already opened to the public, it takes nothing away from the owner of the adjoining land. He suffers no detriment and no injury; and should the law provide a mode of awarding him compensation it would be a nugatory provision, for he parts with nothing of value.

The first section of title four of the act of the 17th April, 1854, to consolidate the cities of Brooklyn and Williamsburgh, &c. gives the common council power to cause streets and avenues to be opened and widened, regulated, graded and paved, and to cause sewers, drains, wells and pumps to be constructed therein. The subsequent sections of the title prescribe the manner of opening streets and estimating the value of the lands taken, and the benefits to be derived therefrom. There is much force in the suggestion that in acquiring land for the uses of a street, the damages are estimated and compensation awarded to the owner, not alone for the mere right to pass and repass, but also for the other uses—such as sewers, drains, wells and pumps—referred to in the act. I do not, however, rely so much upon that as I do upon the legal principles to which I shall refer. There are certain powers and privileges incident to the right of way which it may be well to notice. They may be classed generally as those which are necessary to the perfect enjoyment of the right to pass and repass. There is the right to dig the soil and to use the material and timber for the repair of the road. It is evident that as mankind progress in physical and material improvements, these incidental privileges must increase, and be greatly enlarged. The mere right to pass and repass upon the surface of the ground would not fulfill

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the conditions of a highway, at the present time. Among the first conditions of a good road is a level surface, and this implies the right to grade, to reduce the elevations and fill up the depressions. The right to do this would hardly be disputed. Another condition is that the road should be kept free from accumulations of water. This would imply the power to make drains and sewers for its removal. Should the water collect upon the adjoining lands in consequence of elevating the depressed portions of the road way, the right and the obligation of the public authorities would necessarily follow for its removal by drains and sewers. It has been held that the right to erect toll-houses and sink wells followed as incidental to the grant of an easement for a turnpike road. (*Tucker v. Tower*, 9 *Pick.* 109.) These privileges incidental to the use of a highway must expand and multiply in regard to the streets and avenues of cities. The right to sink wells and cisterns has been freely exercised, and has not, as I am aware of, ever been disputed. Large and copious streams of water flowing through every street and into every house have now become a prime necessity in every healthy and habitable city. No one doubts the right of the corporate authorities to lay down the mains and pipes for this purpose in the public streets without compensation to the owners of the fee. So it is with gas pipes, distributed over the entire city. A complete and comprehensive system of sewerage also becomes a necessity under such circumstances. And the right to construct the necessary sewers in the public streets, to remove and conduct away the waters and impurities which collect therein to the prejudice and peril of health and life, as well as from the adjoining lots, must from necessity exist as a right incidental to the use of a street. When the public intervene with sanitary regulations like those contemplated by the act of the 15th April, 1857, no onerous and irksome burdens are imposed upon the land owners. "Such intervention on behalf of the public is not to be confounded with the old sumptuary laws; for it interferes with things, and not with

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persons. Nor can it be compared to attempts to regulate labor or wages, or to restrain trade. For it is not done to procure, by artificial adjustment of something which men can best settle for themselves, some speculative advantage; but, on the principle of *salus populi suprema lex*, to protect one set of human beings from being the victims of disease and death through the selfish cupidity of others. The rules and operations for the protection of health in ancient Rome were of a very radical and peremptory character, and allowed no minor interests to interfere with them. It seems to have been a rule with them that from the time when the foundation of a city was laid to that of the summit of its greatness, no structural operation, public or private, should be permitted to take a shape which might render it a harbor either for disease or crime. And it is to this vigilant forethought, that in the absence of other organized agencies discovered only in our later times, we may attribute the success with which that remarkable people preserved social order throughout so dense and vast a mass of human beings as the inhabitants of the imperial city in the days of its greatness."

It has been suggested that the opening and constructing of a sewer in a public street would conflict with the right claimed and freely exercised by the owners of the fee in cities, of making vaults under the side walks, to be used as the depositories of books and other property. The question however still occurs, who have the superior right, the public or the owner of the fee; for if the right of drainage is incident to the use as a street, then certainly the construction and occupation of vaults below the surface and within the line of the street can be justified only when the public uses are not impaired or invaded. Indeed I do not see how such structures can exist, except by the sufferance and permission of the public authorities. When completed, they may offer no impediment to the public travel. They may be secure against the superincumbent weight. But they cannot be constructed or repaired without creating a chasm or opening in

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the street, dangerous and detrimental for the time being, which the municipal authorities would have power to prevent.

The case of *Plant v. The Long Island Rail Road Co.*, (10 Barb. 26,) was an action by the lessee of a messuage and tenement on Atlantic street, in Brooklyn, over which the defendant had the franchise for a rail road, and under and through which it had also constructed a tunnel for its railway, under an ordinance of the common council. The plaintiff put in issue the right to tunnel the street, and claimed damages for the injury to his business, which was that of selling goods. The general term in New York held he could not recover; and in delivering the opinion Mr. Justice Edwards says, "Although a highway in the country is, as a general rule, needed for no other purpose than as a place of passage and repassage, yet the case is different as to a street in a populous commercial city. There are many uses to which streets in large cities are usually appropriated for the promotion of health, trade, commerce and public convenience, such as the construction of drains, sewers, and the laying water and gas pipes. These are servitudes which are highly beneficial to the public and in no way injurious to the private rights of individuals. They do not interfere with the surface of the street. They in no manner impair the right of free passage and repassage. Neither are they injurious to the adjoining property. On the contrary, they are directly or indirectly advantageous." In these views I concur.

I conclude, therefore, that the plaintiff is not entitled to the injunction; and that the order of the city court must be affirmed, with \$10 costs.

[ORANGE GENERAL TERM, September 10, 1860. *Lott, Emott and Brown*, Justices.]

JAMES SAVAGE and others vs. ROCKWELL PUTNAM and others.

The ordinary effect of the death of one of the members of a partnership is, to work its dissolution. The partnership is ended. The connection has been dissolved; and the future relations of the surviving partners to each other must be determined by some new agreement between them, or by the results which the law pronounces upon their acts and proceedings, when no new agreement is in fact made. And so of a change in the concern, effected by a transfer of stock.

Where articles of copartnership provide that parties may transfer their stock—in effect that new members may be introduced into the firm, and existing members may withdraw—the object of which provision is to *continue* the partnership, and prevent its dissolution; the effect is to make the new stockholder a member of the firm, with all the ordinary rights and liabilities of a partner, entitled to all the property, profits and dividends represented by his shares of stock, and subject, to the same extent, to all the debts, liabilities and losses of the concern. He takes the stock *cum onere*. In 1847 two of the plaintiffs, R. and W., together with other persons, entered into a partnership or company, for lumbering purposes, with a capital of \$10,000. They subscribed certain articles of association specifying the officers and directors of the association and the mode of carrying on its business. The 12th article provided for a transfer of the stock owned by any member, and in effect authorized such transfer to any third person, on notice to the directors. The articles did not declare what should be the effect of such a transfer, nor whether the out-going member should remain liable, or the in-coming member should become liable for the then existing debts of the copartnership, as between the members themselves; nor what should be the effect of the death of any of the members upon the existence or terms of the partnership. Prior to July, 1849, various changes had occurred in the membership of the association, by transfers of stock between members, and to new parties, and W. P., one of the original shareholders had died. All of the present plaintiffs, and the defendants P. and V. had become members of the association. At this time a new agreement, in writing, was entered into, subscribed by the parties to this action, recognizing the existence of the association, reciting what lands belonged to it, and who were the holders of the shares, and declaring that said lands were owned by them in proportion to the amount of their shares of stock, and pledging their respective interests in the property and effects of the association to the payment of all the existing *and future* debts of the association, and promising to pay such indebtedness in proportion to the amount of their stock. The agreement further provided that the subscribers should not be liable for any debts contracted after they had sold out their stock and left the association &c. On or prior to October 25th, 1853, P. and V. sold out their stock, and ceased to be members of the concern. Various loans had

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previously been made, and debts incurred, to carry on the business of the association. Subsequent to that time, the plaintiffs, with the funds of the association, paid several of its debts contracted while P. and V. were stockholders. This suit was brought to enforce a contribution by P. and V. to those debts. P. claimed to be allowed, as a counter-claim, the sum of \$305.46 which he had been compelled to pay, upon a debt of the association incurred during his membership.

- Held*, 1. That under the original articles of association P. and V., though liable to the creditors of the copartnership, for any indebtedness existing during their membership, were not primarily liable, equally with the plaintiffs, but were merely sureties for the plaintiffs as their principals, and were therefore not liable in this action.
2. That the plaintiffs were not aided by the new agreement, of July, 1849.
3. That P. having been compelled, as surety for the plaintiffs, to pay a debt owing by the copartnership, was entitled to his remedy over against his principals; and that his counter-claim was therefore properly allowed.

THIS was an appeal by the plaintiffs from a judgment rendered on the report of a referee in favor of the defendants Rockwell Putnam and Sidney Verbeck, dismissing the complaint with costs as to them, and allowing a counter-claim in favor of the defendant Putnam against the plaintiffs. On the 19th of January, 1847, two of the plaintiffs, with other persons, formed a company under the name of the Saratoga Steam Mill Lumbering Association, and entered into articles forming this company with a capital of \$10,000, divided into one hundred shares of one hundred dollars each. These shares were transferable to other persons, after three days' notice to the directors of the intention to make the transfer, and giving the right of pre-emption to any member of the association. A president, secretary, treasurer and directors were provided for, and detailed directions given as to the mode of managing the affairs of the association. In April, 1849, Washington Putnam, one of the original subscribers, died, and under the provision for the transfer of stock various changes had been made in the membership of the association, prior to the 27th day of July, 1849. All the present plaintiffs, and the defendants, Putnam and Verbeck, had become members. The defendant Young came in subsequently. On the 27th day of July, 1849, the plaintiffs and

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the defendants, Putnam and Verbeck, subscribed a written agreement, reciting the lands belonging to the Saratoga Steam Mill Lumbering Association; stating that they belonged, in certain shares, to Patrick H. Cowen, estate of Washington Putnam, Rockwell Putnam, William L. F. Warren, George W. Wilcox, Enoch H. Rosekrans, Sidney Verbeck, James Savage and James M. Andrews, and they covenanted that each of said parties, so composing said association, held such interests in said lands and premises as were proportioned to the amount of their shares in the capital stock. They further agreed that their interests in the real and personal property of said association, then owned or thereafter acquired, should, if necessary, be proportionably appropriated to the payment of all debts and demands then outstanding against said association, and should also be held as security for all notes thereafter made or given, and for all indebtedness incurred for the use and benefit of said association in the management of their business; and in case of default in paying such proportional share, that their respective interests in said real and personal estate might be sold at public auction on three months' notice in a public newspaper, under the direction of the directors, and the avails appropriated to the costs and expenses of the sale and the payment of said debts. They further agreed to pay their proportionate share of all notes and indebtedness so given or increased, to the persons intitled thereto. But they were not to be liable for any notes or indebtedness given or contracted after they had sold out their stock and left the association, nor for any notes or obligations not signed or indorsed by them, nor for any indebtedness to which they had not given their consent. Between that date and the 20th day of July, 1853, the defendants, Putnam and Verbeck, sold out their stock and left the association, and the defendant Young became a member thereof. Between the same dates, also, and while Putnam and Verbeck were members, various debts were contracted in the business of the association. After the last mentioned date several of these

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debts were paid by the plaintiffs out of the funds and property of the association, and this suit was instituted to compel contribution by the defendants, Putnam and Verbeck, to those debts, they refusing to pay on the alleged ground that before the payment thereof they had ceased to be members of the association, and stood only in the situation of sureties to the plaintiffs. The referee so held, and dismissed the complaint as to them. He also allowed to the defendant Putnam a counter-claim of \$305.46 for that amount which he had been compelled to pay upon a debt of the association incurred during his membership.

W. A. Beach, for the appellants.

A. Bockes, for the respondents.

By the Court, HOGEBOM, J. The judgment which the plaintiffs ask in their complaint in this action is, that the copartnership between them and the defendants Putnam and Verbeck, may be dissolved; that an account may be taken of the copartnership dealings, indebtedness and effects; and that the real estate and effects of the copartnership may be sold, and the avails applied to the indebtedness of the copartnership and the equitable claims of the copartners as between themselves, and if insufficient for that purpose, that the parties may be compelled to contribute their proper proportion of the deficiency. The plaintiffs ask also for general relief.

The judgment which the referee has rendered, and from which an appeal is taken to this court, is that the complaint be dismissed with costs as to the defendants Putnam and Verbeck; and that the defendant Putnam recover, as for a valid counter-claim, the sum of \$305.46 with interest, against the plaintiffs, and that he have execution therefor; and that the said judgment be without prejudice to any further action or proceeding by the plaintiffs and the defend-

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ant Young, or any of them, as between themselves or any other persons than the defendants Putnam and Verbeck.

Although the judgment rendered may possibly not cover the entire relief to which the plaintiffs might be entitled upon the case made by the pleadings and proofs, I shall assume that the only matter really in controversy between the parties is, whether the defendants Putnam and Verbeck are primarily liable, equally with the plaintiffs, in proportion to their interests in the partnership business at the time they sold their stock, for the then existing debts and liabilities of the copartnership, so as to entitle the plaintiffs to institute this suit against them for contribution; or whether the defendants Putnam and Verbeck, though liable to the creditors of the copartnership for any indebtedness existing during the period of their connection therewith, are in fact merely sureties for the plaintiffs as their principals, and therefore not liable in this action.

The defendants were not originally members of the partnership. In 1847 two of the plaintiffs, Rosekrans and Wilcox, together with other persons, entered into a partnership or company and subscribed certain articles of association, forming a company called the Saratoga Steam Mill Lumbering Association, with a capital of \$10,000 divided into shares of \$100 each. The articles provided for officers and directors of the association, and for the mode of carrying on its business. The 12th article provided for a transfer of the stock owned by any member, and in effect authorized such transfer to any third person, on giving the directors three days' notice of such intended transfer, and allowing any member of the association the first privilege of purchase. They did not declare what should be the effect of such transfer, nor whether the outgoing member should remain liable, or the incoming member should become liable, for the then existing debts of the copartnership, as between the members of the firm themselves. Nor did they provide what should be the effect of the death of any of the members upon the existence

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or terms of the partnership. Both of these contingencies, however, occurred, and as the parties themselves have not provided for them, the effect which these events produced upon the relations of the parties to each other, must be determined by the rules of law. The ordinary effect of the death of one of the members of a partnership is to work its dissolution. The partnership is ended. The connection has been dissolved, and the future relations of the surviving parties to each other must be determined by some new agreement between them, or by the results which the law pronounces upon their acts and proceedings when no new agreement is in fact made.

And so of a change in the concern effected by the transfer of stock. As this is allowed by the articles of association, it follows that the vendor of the stock must cease to be, and the purchaser of the stock must become, a member of the association. If it were a corporation, neither the outgoing member, nor indeed any of the stockholders, would be personally liable for the debts of the concern, unless made so by the law which created the corporation. In the case of a voluntary association, the liability of the outgoing member would depend upon circumstances. In the absence of any agreement upon the subject, or any specification or limitation of time for the continuance of the partnership, the withdrawal of any member of a firm would work its dissolution, and the introduction of a new member would create a new partnership. Here, however, there is an agreement that parties may transfer their stock—in effect that new members may be introduced into the partnership, and existing members may withdraw. The object of this is to *continue* the association, and to prevent its dissolution. And the effect, I think, must be to make the new stockholder a member of the firm, with all the ordinary rights and liabilities of a partner—entitled to all the property, profits and dividends which are represented by his shares of stock, and subject, to the same extent, to all the debts, liabilities and losses of the concern.

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He takes the stock *cum onere*. The vendor of the stock is supposed to examine all these questions before he sells his stock; and he sells it for a high or low price, accordingly. The same thing occurs to the purchaser. I think, therefore, the vendor of the stock, in the absence of any stipulations to the contrary, from the time of the sale relieves himself, as between him and his former associates, from all liability for the past indebtedness of the concern, as he certainly disentitles himself to any account for the property or profits of the establishment. It is really what the law denominates a continual partnership; but it is not very material whether it is styled a continuation of the former firm, or a dissolution of the old and the formation of a new one, with an implied or express understanding that the new shall occupy the place of the old one, entitled to its benefits and subject to its liabilities.

Prior to July, 1849, various changes had occurred in the membership of the association. Shares of stock had become transferred, sometimes between the members themselves, sometimes to new parties, so that before the period last mentioned Washington Putnam, one of the original shareholders, had died, and all of the present plaintiffs, and also the defendants Putnam and Verbeck, had become members of the association, holding various and unequal shares of stock. At this time a new written agreement was entered into, subscribed by all the parties to this action, (except Young) recognizing the existence of the association, reciting the lands which belonged to the association, and who were the holders of the shares, (the last named parties and several others,) declaring that said lands were owned by them in proportion to the amount of their shares of stock, and pledging their respective interests in the property and effects of the association to the payment of all the existing *and future* debts of the association, and providing further for a sale of such interest by the *directors* in case of default of such payment, and promising to pay such indebtedness, (past and future,)

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in proportion to the amount of their stock. The agreement further provided that they should not be liable for any debts contracted after they had sold out their stock and left the association, nor for any indebtedness to which they had not given their consent.

After the making of this agreement, and before the defendants Putnam and Verbeck retired from the association, various loans were made and debts incurred, to carry on the business of the association. On or prior to the 25th day of October, 1853, the defendants Putnam and Verbeck had sold out all their stock, and ceased to be connected with the concern. Subsequent to that time, and as the referee finds, with the funds of the association, the plaintiffs paid several of the debts of the association contracted during the period that Putnam and Verbeck were shareholders, and this suit is brought to enforce a contribution to those debts. I have already expressed the opinion that under the original articles of association such liability did not exist. The question is whether the plaintiffs are aided by the new agreement of 1849. By that agreement the existence of the original association is recognized, and the terms of those articles of association must be observed, except so far as they are modified by the subsequent agreement. By that agreement, it is stipulated that the subscribers to it will pay the existing and future liabilities of the association, and that their interest in the property and effects of the association may, if necessary, be applied to that object. But I think it must be understood that this was with the qualification that their liability as between themselves should be limited to the period of their membership. And, thus understood, it expressed precisely what would be their legal liability under the original articles. There seems no reason why they should have contracted a liability unlimited in amount and perpetual in duration, in a business over which, after they left it, they had no control, in whose profits they did not participate, and whose assets were properly applicable to the extinguishment of these de-

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mands, and had been doubtless applied to such purpose, so far as those demands had been actually extinguished. I am unable to see that the conclusion sought to be drawn by the plaintiffs from the terms of this agreement, reasonably or naturally flows from it; and I am of opinion, therefore, that the report of the referee is right upon that part of the case.

It follows also, as a consequence of this construction, that the referee was right in allowing the set-off. Putnam was in legal effect the mere *surety* for the plaintiffs for the debts which his withdrawal from the concern imposed upon the remaining members of the copartnership. He was, however, liable to the creditors themselves, and being thus compelled to pay, was entitled to his remedy over against his principals. The substance of this defense is set forth in his answer, and it was a matter of discretion on the part of the referee to allow an amendment so far as to present it in such a formal way as to enable him to obtain the benefit of it at the hearing, as a valid counter-claim.

The report of the referee seems to be right in all material respects, and the judgment entered upon it should be affirmed, with costs.

[ALBANY GENERAL TERM, December 5, 1859. *Wright, Gould and Hogboom*, Justices.]

ELIZABETH BREWSTER vs. ORRISON BREWSTER.

The limitation of 20 years, prescribed by the revised statutes for actions to recover dower, is applicable to cases where the husband died and the wife's title accrued previous to the passage of the revised statutes. *PACKER*, J. dissented.

APPEAL by the defendant from an order made at a special term, sustaining the plaintiff's demurrer to the answer of the defendant. The facts are sufficiently stated in the opinion of the court.

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W. A. Beach, for the defendant.

O. H. Denio, for the plaintiff.

HOGEBROOM, J. This is an action of ejectment for dower, commenced in 1859. The answer alleges that the plaintiff's husband died in 1827, and that she, being under no disability, has not prior to this suit, in any way demanded her dower, nor had the same assigned or admeasured to her, and is therefore barred of her action. To this answer the plaintiff demurred as not constituting a defense to the action, and the court at special term sustained the demurrer, with liberty to the defendant to answer over. The question presented by the demurrer therefore is, whether the limitation of 20 years prescribed by the revised statutes of 1830 for actions to recover dower, is applicable to cases where the husband died, and the wife's title accrued prior to 1830.

Prior to 1830 the law of 1813 was in force, giving to the widow the right to demand her dower at any time *during her life*. (1 *R. L. of 1813*, p. 60, § 1.) While this law was in force the husband died, and the wife's title became vested, and if the law had not been changed she, of course, could have demanded her dower and brought her action at any time during her life. But in 1830 the revised statutes took effect, and they provide that, "a widow shall demand her dower within twenty years after the death of her husband." This statute is undoubtedly prospective, and not retrospective; that is, the limitation specified therein shall not operate to bar dower until at least twenty years after the passage of the act and twenty years after the death of the husband: but there seems no good reason why a reasonable limitation, adopted from reasons of general policy applicable to all cases, should not be applied to cases where the husband's death has already occurred; provided the period of limitation applicable to all other cases is not curtailed. There is no constitutional provision violated; there is no impairing of the obligation of contracts; there is no interference with

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vested rights. There is no vested right in a statute of limitations. The period of limitation of actions is within the control of the legislature, subject, perhaps, to the implied restriction that it shall not be so exercised as substantially to destroy or impair a vested right. Hence, in *The People v. The Supervisors of Columbia*, (10 *Wend.* 365,) the court say: "The revised statutes apply the limitation to actions, or causes of action, accruing or *existing* subsequent to their taking effect. They apply to existing demands as if they had accrued at the time when the statute commenced its operation. If the state neglects to prosecute for the period which protects individual claims, it loses the demand in the same manner as individuals do; but the demand in question would not be barred upon that principle, until six years after the revised statutes became the law of the state." In *Spoor v. Wells*, (3 *Barb. Ch.* 199,) the chancellor held, under the provisions of the revised statutes fixing a limitation of 20 years to equitable actions, that an equitable claim upon which a bill in chancery could have been filed previous to the first of January, 1830, and where the complainant was under no legal disability, is barred, by the provisions of the revised statutes, at the expiration of ten years after the revised statutes went into operation. In *Sayre v. Wisner*, (8 *Wend.* 664,) which was an action of ejectment for dower, brought in 1830, while the court refused to apply the limitation of the revised statutes to the plaintiff's claim, for the reason that the husband had been dead more than 20 years before and the plaintiffs had acquired a vested right in the premises in controversy, they at the same time say: "It is strictly within the reason of the rule of construction above referred to, to say that it may be applicable to cases of *previous death*, but not till 20 years after the statute takes effect." The same rule was laid down in *Ward v. Kilts*, (12 *Wend.* 139,) which was an action of ejectment for dower, commenced in 1832, where the husband died in 1809 or 1810, and the court say: "As to the right of dower being barred by lapse of time, this

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point has been settled, in *Sayre v. Wisner*, (8 *Wend.* 661,) which decides the revised statutes creating the limitation to be prospective and therefore not applicable here;" by which I understand the court to mean, that after the lapse of 20 years from the passage of the act, the right of action would be barred. In *Williamson v. Field*, (2 *Sandf. Ch.* 568,) Vice Chancellor Sandford, in discussing the ten years' limitation applied by the revised statutes to suits in equity, held that it did not apply to rights of action which accrued prior to 1830. Vice Chancellor Hoffman came to the opposite conclusion, in *Lawrence v. Trustees of the Leake and Watts Orphan House*, (2 *Denio*, 583.) In *Calkins v. Calkins*, (3 *Barb. S. C. R.* 309,) Justice Mason at special term reached the same conclusion as to the equity limitation with Vice Chancellor Sandford. But I think the weight of authority and the reason of the rule are stronger in favor of the application of the limitation contended for, and that it is not inconsistent with the language of the statute. It should therefore be held to apply.

The revised statutes, and the limitation provided therein, are therefore applicable to this case, unless there is some exception in them, or in the code which forbids such application. This exception is supposed to be contained in 2 Revised Statutes 300, section 45, which provides that "the provisions of the preceding articles of this title shall not apply to any actions commenced, not to any cases where the right of action shall have accrued, or the right of entry shall exist before the time when this chapter takes effect as a law, but the same shall remain subject to the laws now in force." The title herein referred to is title 2 of chapter 4 of part 3 of the revised statutes, which does not fix the limitation of actions for dower. The latter is contained in title 3 of chapter 1 of part 2 of the revised statutes. The exception is therefore inapplicable to the present case. The same remark may be made in regard to section 73 of the code, title 2, which regulates the time of commencing civil actions, but expressly

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declares that as "to actions already commenced or to cases where the right of action has already accrued, the *statutes now in force* shall be applicable to such cases according to the subject of the action and without regard to the form."

Again; reference is made to section 11 of title 5 of chapter 1 of part 2 of the revised statutes, (1 R. S. 750,) being the closing section in that chapter, as withdrawing the present action from the operation of the 20 years' limitation. That section is as follows: "None of the provisions of this chapter, except those converting formal trusts into legal estates, shall be construed as altering or impairing any vested estate, interest or right, or as altering or affecting the construction of any deed, will or other instrument, which shall have taken effect at any time before this chapter shall be in force as a law."

I have already expressed the opinion that a mere making or alteration of a statute of limitations does not alter or impair any vested estate, interest or right. It is in no wise impaired in its nature or legal effect; it remains in every respect precisely the same. To say that a statute of limitations cannot be passed, regulating the period of its enforcement, is to say, in substance, that no general legislation whatever can take place on this subject, and would be a degree of restriction upon legislative action, not heretofore supposed to exist. Statutes of limitation are now conceded to be merely statutes regulating the remedy, and not impairing the right, unless, as before stated, they are carried to that degree as to be virtually destructive of the right. The statute in question is not of that character, but on the contrary may be regarded as a salutary limitation, dictated by a wise policy.

The order of the special term must be reversed with costs, and judgment must be given for the defendant upon the demurrer, with leave to the plaintiff to amend on payment of costs.

GOULD J. concurred.

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PECKHAM, J. (Dissenting.) I concur generally in the reasoning and principles of the foregoing opinion of Justice Hogeboom; but I dissent from the opinion in its application to this case. I agree that the statute as to dower, is prospective; and in my judgment it was intended to apply to those cases only where the husband should die after the passage of the act. This, I think, best accords with the language and spirit of the act. I do not deny the power, but the purpose, of the legislature.

To make it apply here, its language should be amended so as to read, "a widow shall demand her dower within twenty years after the death of her husband," (by adding,) "or if she be already a widow, then within twenty years from the passage of this act." This would, perhaps, be a good amendment; but it had better be made by the legislature, rather than by the courts.

In all analogous cases, it is clear that the legislature imposed no limitation where the right of action had already accrued—a fair inference that they intended none here, unless clearly expressed otherwise. Nor do I deem it safe, in construing a statute, to rely to any extent—certainly not to any great extent—upon the policy or expediency of passing such an act. It is safer, in my opinion, in interpreting a statute, to give the language its plain, palpable meaning, and not enlarge or extend it by construction.

The principle, too, of applying statutes to future cases—that they shall operate *in futuro* rather than to the past—is better preserved by this construction.

Judgment for defendant.

[ALBANY GENERAL TERM, May 7, 1860. Gould, Hogeboom and Peckham, Justices.]

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BOUTWELL *vs.* O'KEEFE and BOYLE.

A contract void by the statute of frauds, is capable of becoming valid and obligatory by subsequent part performance.

Where there are subsequent transactions between the parties to a void contract, which are not only in apparent conformity to the terms of such contract, but in actual execution of it—done *under* the contract—the contract originally void becomes valid and obligatory upon the parties, and they cannot successfully resist its enforcement.

Where the plaintiff entered into a parol agreement with the defendants, to furnish them with all the meal they wanted, at stipulated prices, payable partly in cash, partly in rail road stock, and partly in rail road bonds; and he subsequently delivered meal to the defendants, at various times, under the contract, and received from them some cash payments, but no stock or bonds were issued to him, and he waived the delivery thereof, and agreed to accept certain requisitions from the chief engineer, upon the rail road company, instead; and he never recalled such waiver, until after he had himself broken the contract; *Held*, in an action by the plaintiff to recover a balance due to him for the meal delivered, that the defendants were entitled to recoup their damages for the failure of the plaintiff to deliver the meal, when required to do so.

Held also, that the defendants could not be deemed guilty of a breach of the contract, in failing to furnish the stock and bonds according to the agreement, without proof that they were requested to furnish the stock and bonds, after the plaintiff had agreed to accept the requisitions in lieu thereof, or that the latter agreement or consent had been suspended, or withdrawn, by the plaintiff.

Held further, that in order to put the defendants in fault for refusing to furnish the stock and bonds, upon demand made, the demand should have been made sufficiently long before the suit was commenced, to enable them to comply with it.

ON or about the 1st of June, 1851, the defendants, being contractors for work both upon the Troy and Bennington rail road, and also the Harlem rail road, an agreement was made between the plaintiff and defendants, by which the former was to furnish to the latter *all the meal they wanted for their works*, at stipulated prices, for which he was to be paid *monthly*; one half in cash, one quarter in the stock of the Troy and Bennington Rail Road Company, and one quarter in the bonds of the same company, with a guaranty of the Troy and Boston Rail Road Company that the stock and

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bonds should pay six per cent. The meal for the Harlem works was to be delivered at the boats, free of charge, and the meal for the Troy and Bennington works to be delivered at the works for *eighteen pence* per hundred, to be paid in the same manner as the meal. The agreement was not in writing; but in July following, the plaintiff delivered meal, which the witness testified and the referee found was delivered *under the contract*, to the amount of \$183.04, on account of which in August he received from the defendants a cash payment of \$100. No stock or bonds of the company had then been issued, but the defendants had *requisitions* from the chief engineer upon the company, which had been accepted by the treasurer, for such stock and bonds, which, when issued, would bear date and draw interest from the date of the requisitions. The plaintiff requested the defendants to retain the requisitions until the stock and bonds were issued, and then to hand the latter to him. In August, 1851, the plaintiff delivered meal to the amount of \$431.91, the cash payment on account of which was made by the defendants. This payment was \$207.47, and was made in September, 1851. The defendants again offered the plaintiff the requisitions for the stock and bonds. The plaintiff expressed some dissatisfaction with the tardiness of the company in issuing their stock and bonds, but did not make a demand for them. In Sept. 1851, the plaintiff delivered meal to the amount of \$565.50, and was paid in cash the sum of \$282.75, in October, 1851. In October, 1851, the plaintiff delivered meal to the amount of \$270.98, for which no payment seems to have been made, and none demanded till about the time of the commencement of this suit. The defendants afterwards repeatedly ordered more meal, and the plaintiff promised to deliver it, but did not do so. Several interviews took place between the parties in reference thereto. Evidence was received by the referee, subject to objection, of damages sustained by the defendants by the non-delivery of the meal ordered by them, but the referee finally decided that the defendants were not

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entitled to set off or recoup their damages, and the defendants excepted.

On the 3d of December, 1851, this action was commenced, to recover the balance due to the plaintiff, on account of the meal delivered. There was testimony in the case tending to show, although the referee has not found the fact, that on the day the suit was commenced, the plaintiff demanded of the defendants the stock and bonds, and that they refused to deliver them, claiming that the plaintiff had broken the contract, and that the defendants had sustained damages thereby. They said they would furnish the stock and bonds if the plaintiff would fulfill the contract on his part. The plaintiff simultaneously said that he would fulfill the contract satisfactorily if the defendants would. They were at issue on this point, and no further offer or tender was made.

The defendants in their answer set up the contract and its breach, by way of defense, and claimed to recoup in damages for its non-performance by the plaintiff. The cause was referred to J. Romeyn, Esquire, as referee, who, on the 21st of June, 1858, reported that there was due to the plaintiff, upon the account mentioned in the complaint, the sum of \$661.62, to which he added interest, making \$964.94, for which sum, with costs, judgment was perfected on the 25th day of June, 1858; and the defendants appealed therefrom to the general term.

The referee having found the facts substantially as above stated, found as conclusions of law therefrom, 1. That the contract was severable, and an entire performance by the plaintiff was not a condition precedent to the liability of the defendants. The defendants excepted. 2. That the original contract was void by the statute of frauds, and that each delivery of meal *under it* became a separate and distinct transaction. The defendants excepted. 3. That the plaintiff having duly performed the principal part of his undertaking, the benefit of which the defendants had received and retain, the mutual agreement of the parties would be deemed

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independent. The defendants excepted. 4. That the failure of the defendants to furnish the stock and bonds according to the contract was a breach, and justified the plaintiff in his neglect further to perform. That although the plaintiff may have waived the breach, the waiver was temporary, and that he might at any time require payment of the stock and bonds properly guarantied. That upon every delivery of meal there was a renewed breach. The defendants excepted. 5. That the defendants were not entitled either to a set-off or to recoup any damages. The defendants excepted.

The defendants also excepted to the report made in favor of the plaintiff, and to each and every part thereof, and to each and every of the several findings of fact and conclusions of law found by the referee.

Ira Harris, for the defendants.

W. A. Beach, for the plaintiff.

HOGEBROOM, J. The parol contract between the parties, for the sale and purchase of the meal, as originally made, was absolutely void by the statute of frauds. But since the case of *McKnight v. Dunlop*, (1 *Seld.* 537,) it can no longer be contended that it was incapable of becoming valid and obligatory by subsequent part performance; or that subsequent deliveries of articles, from time to time, in execution of the contract, are to be regarded as separate and distinct transactions, or as so many separate and independent contracts. The latter would seem to be the rule, as held by the superior court of New York, (*Seymour v. Davis*, 2 *Sandf. S. Court Rep.* 239; *Deming v. Kemp*, 4 *id.* 147;) but it is not the rule in this court, or in the court of appeals. (*Sprague v. Blake*, 20 *Wend.* 61. *Baker v. Cuyler*, 12 *Barb.* 667. *McKnight v. Dunlop*, 1 *Selden*, 537.) Perhaps the conflict between the courts is rather apparent than real, and turns on a question

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of fact, rather than of law. The superior court holds, as I understand it, that the subsequent transactions or delivery of articles, though of the character and description of those mentioned in the void parol contract, are not to be *presumed* to be under or in execution of the original contract, but, in the absence of explanation, independent transactions. However that may be, it is clear by the rule laid down in the court of appeals, that if the subsequent transactions are not only in apparent conformity to the terms of the original contract, but in actual execution of it—done *under* the contract—the contract originally void becomes valid and obligatory upon the parties, and they cannot successfully resist its enforcement. In this case the referee has found, as a matter of fact, that “the plaintiff went on and delivered meal *under the said contract*,” and he proceeds to specify the particulars. The contract therefore became thereby valid and operative between the parties.

I am not able to discover that it was subsequently broken by the defendants; at least not until after it had been broken by the plaintiff. The plaintiff was undoubtedly entitled to require the guarantied stock and bonds, but he *waived* them, and agreed to accept the requisitions instead, and in fact, in the language of the referee, “desired the defendants to keep the requisitions, and as soon as they could get the stock and bonds, to hand them to him.” After that time he never, so far as I can see, recalled this waiver, or demanded the stock and bonds, until the very day and almost at the very moment of commencing this action. At the latter period, he had himself broken the contract, by repeated neglects or refusals to deliver meal when ordered by the defendants. Thus far, the defendants had performed the contract, for they held the requisitions subject to the order of the plaintiff and at his request. They were therefore entitled, in this action, to recoup their damages for the failure of the plaintiff to deliver the meal when ordered. The referee therefore erred in deciding against the defendants on this point; and for this

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reason, if no other, a new trial must be awarded. The referee in his conclusions of *law* has decided that the defendants were guilty of a breach of the contract in failing to furnish the stock and bonds according to the contract, and that this justified the plaintiff in his neglect further to perform. But he has failed to find, as a matter of *fact*, what is essential to support his conclusion of *law*, to wit, that the defendants were ever requested to furnish the stock and bonds after the plaintiff had agreed to accept the requisitions in lieu thereof, or that this latter agreement or consent had ever been suspended or withdrawn by the plaintiff. The referee intimates that the plaintiff may have waived the breach of the contract. It would have been more correct to say that he had in fact waived the furnishing of the stock and bonds. The referee says the waiver was temporary. The fact is, the waiver had never (until just as the suit was about to be commenced,) been recalled. Very probably the requisitions were intended only as a temporary substitute for the stock and bonds, but they remained a valid substitute until the plaintiff chose to terminate that condition of things by a distinct demand of the stock and bonds. This demand was made just as the suit was about to be commenced. It was not made sufficiently long before the commencement of the action to enable the defendants to comply with it; and that would have been a good defense to the action, if the defendants had put themselves upon that ground at the time.

Whether the first breach of the contract by the plaintiff put it out of his power to exact an enforcement of it from the defendants until he had filled the orders of the defendants, or had offered to supply their orders for the future, it is not necessary perhaps to inquire; as there must be a new trial granted for the erroneous disallowance of the defendants' damages for the plaintiff's breach of the contract.

The judgment entered upon the report of the referee must be reversed, and a new trial granted, with costs to abide the event of the action.

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PECKHAM, J. concurred.

GOULD, J. I do not see how the referee's fourth finding of *law* can be read otherwise than as based on the *facts*, that the defendants *neglected* and *refused* to furnish the stock and bonds when called for; and *therefore* they were guilty of the *first breach*. This would *sustain* the report. But I do not see that the findings of *fact* cover this ground.

Therefore I concur in the opinion above.

New trial granted.

[ALBANY GENERAL TERM, May 7, 1860. *Gould, Hogeboom and Peckham, Justices.*]

HOLMES vs. CARLEY.

Where towns corner together, although they do not touch each other at any other point except the corners, they are to be deemed *adjoining* towns, within the meaning of the statute authorizing actions to be brought before a justice of the peace of another town, in the same county, "next adjoining" the residence of the plaintiff or defendant. (2 R. S. 226 § 8, sub. 3) BALCOM, J. dissented.

THIS action was brought before a justice of the peace of the town of Virgil. Both parties resided in the town of Marathon, and the defendant raised the objection that the justice had not jurisdiction, for the reason that he did not reside in a town in which either party resided, or in a town *next adjoining* the residence of the plaintiff or defendant. The justice overruled the objection, and rendered a judgment against the defendant in favor of the plaintiff for \$83.50 damages, besides costs. The Cortland county court reversed the judgment, and the plaintiff appealed from the judgment of the county court to this court.

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Horatio Ballard, for the plaintiff.

Dickinson & McDowell, for the defendant.

PARKER, J. The question of fact, whether the defendant converted the plaintiff's wood, as alleged in the complaint, is disposed of by the decision of the justice, in favor of the plaintiff, as is also the question of the amount of damages. The question presented to this court, upon the appeal from the county court is, whether the justice had jurisdiction of the action. This question arises upon the following facts, which appear in the return. The parties, plaintiff and defendant, reside in the town of Marathon; the justice before whom the action was tried, resides in the town of Virgil, all in the county of Cortland. The towns of Marathon and Virgil do not adjoin each other, otherwise than by "cornering together," in the language of the admission. The south line of Virgil, produced east, being the north line of Marathon, and the east line of Virgil, produced south, being the west line of Marathon. The plaintiff brought this action against the defendant by summons, and on the return day, the defendant took the objection that the justice had no jurisdiction of the action, for the reason that the two towns, thus cornering together, were not *adjoining towns*, within the meaning of the statute, (2 R. S. 226, sec. 8, sub. 3, 1st ed.) The facts above stated being shown to the justice he held that he had jurisdiction, heard the cause and gave judgment for the plaintiff. The defendant appealed to the Cortland county court, which reversed the judgment of the justice, and from the decision of the county court the plaintiff now appeals to this court. The language of the statute, above referred to, is as follows: "Every such action" (actions cognizable before justices of the peace) "shall be brought before some justice of the town wherein either: 1. The plaintiffs or any one of them reside; or 2. Where the defendants or any one of them reside; or 3. Before some justice of

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another town, in the same county, next adjoining the residence of the plaintiff or defendant." The object of this provision undoubtedly was, in the language of Justice Gridley, in *Tiffany v. Gilbert*, (4 Barb. 323,) "to prevent the abuse of calling defendants to distant parts of a county when the convenience of neither party required it." In conformity with this intention, the action must be brought before a justice, residing either in the same town with one of the parties, or in a town so near such town as actually to adjoin it. If this adjoining exists, however slightly, the statute is complied with—the objectionable and prohibited distance does not exist—and the abuse, against which the provision is aimed, is prevented. It cannot be denied that when two towns corner together, there is a point of contact between them; and if they are in contact, they adjoin each other. The point of contact is a point of junction at which they are united or joined together. The statute does not require any distance for which the junction must exist. The fact of a junction, or adjoining, is all that is required, to give the justice jurisdiction in such case. If it is said that it must exist for *some* distance more than a point, what criterion is there as to the necessary extent of the jurisdiction? I can see none. The precise distinction between the synonyms *adjacent*, *adjoining* and *contiguous*, is given by Worcester in his dictionary as follows: "What is *adjacent*, may be separated by the intervention of some other object; what is *adjoining*, must touch in some part; and what is *contiguous*, must touch on one side." But it is argued by the respondent that the words in the act, "next adjoining the residence" of the plaintiff or defendant, requires something more than that the justice should reside in a town adjoining the town in which the plaintiff or defendant resides, to wit,—that he must reside in the adjoining town which is nearest to the dwelling house of one of the parties. This effect is sought to be given to the term *residence*, from the fact that the justices' act of 1824 required the action to be brought in

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the town or next adjoining town wherein either the plaintiff or defendant resided ; and that by the existing act, "town" is changed to "residence." I do not think the change in the terms used implies any such intention as is claimed for it by the respondent. The term residence, as used in the present act, evidently means "town in which the plaintiff or defendant resides." This, I think, is the obvious construction of the term, when read in connection with the residue of the section. Besides, the restricted meaning sought to be given to it by the respondent, is impossible. Another town would not *adjoin* the residence of either of the parties, if by residence is meant the particular spot in a town where either resides—the dwelling house of the party. That, of course, if within a town, is separated from the adjoining town by a portion of the town in which it is situated—does not touch such adjoining town ; unless, indeed, it happens to be situated on the line of the town. And it will scarcely be contended that the statute intends to allow the bringing of an action in an adjoining town to litigants so situated, to the exclusion of all other dwellings in the town. Nor does the use of the term "next," as qualifying the word adjoining, so restrict it as to require that the towns shall adjoin to any greater extent than do these towns of Virgil and Marathon, by "cornering together." One town touching another at a single point, is "next adjoining" it, within the meaning of the statute, as truly as if bounding it by the whole length of one of its sides. This is the only reasonable construction of the phrase in this connection ; for if every town touching another is not next adjoining it, then there can be but one town next adjoining any other—for *next*, in the restricted sense sought to be given it, means nearer than all others : and that of two towns touching another, one should be nearer to it than the other is impossible ; unless indeed reference is had to the respective areas of the two. In that case, the aggregate area of the one may be nearer than that of the other. Still but one of any number could be next adjoining,

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and which one that is would require, oftentimes, and commonly, an accurate superficial measurement of the adjoining towns to ascertain. I cannot believe that the legislature intended to make the jurisdiction of justices of the peace dependent upon such mathematical calculations. I think the judgment of the justice was right, and should have been affirmed by the county court. The judgment of the county court should therefore be reversed; and that of the justice affirmed with costs.

MASON, J. delivered an opinion concurring in the above.

CAMPBELL, J. also concurred.

BALCOM, J. (Dissenting.) Freetown lies north of Marathon, and Lapeer west of Marathon—Virgil lies north of Lapeer, and west of Freetown. The southeast corner of Virgil, the northeast corner of Lapeer, the southwest corner of Freetown and the northwest corner of Marathon are one and the same point. Those corners are right angles, and each town is square or in the form of a parallelogram. The question in the case is whether Virgil is a town *next adjoining* Marathon, or whether when a square piece of land is divided into four square towns of equal size, a town in one corner of the square is “next adjoining” the one in the opposite corner. It seems to me such towns do not adjoin—that they do not visibly touch each other. To adjoin means “to lie or be next to, or in contact.”

Whenever a square tract of land is divided into nine square towns of equal size, the center town adjoins only four of the others; and such four are the only ones “next adjoining” it. The center town does not adjoin the four in the corners of the tract by a visible touching. It is not so situated as to have eight towns next adjoining it.

The statute applicable to the question is, that the “action shall be brought before some justice of the town, wherein,

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either, 1. The plaintiffs or any one of them reside; or 2. Where the defendants, or any one of them, reside; or 3. Before some justice of another town in the same county, next adjoining the residence of the plaintiff or defendant." (2 R. S. 226, § 8.) Both parties to the action resided in Marathon, and the action was brought before a justice of Virgil. My conclusion is that Virgil is not a town next adjoining Marathon, within the meaning of the statute above quoted; for these towns do not visibly touch each other. Before a town can be said to lie "next adjoining" another, I think the two should visibly touch each other. And as Virgil does not visibly touch Marathon, I am of the opinion the justice had no jurisdiction of the defendant in this action, and should have so held. It follows that the judgment of the county court reversing that of the justice was correct and should be affirmed.

Judgment of county court reversed.

[BROOME GENERAL TERM, May 8, 1860. *Mason, Balcom, Campbell and Parker*, Justices.]

PECK vs. ANDREWS.

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Where, upon the joining of issue in a justice's court, the defendant moves for an adjournment, to which the plaintiff objects, and demands that the defendant be first required to make oath and give bail, which the defendant refuses to do, it is erroneous for the justice to grant the adjournment, upon such motion, without oath or bail.

Although a justice has the power, in his discretion, to adjourn a cause not exceeding eight days, upon his own motion, with or without the consent of parties, yet where it appears that he did not exercise such discretion, but granted an adjournment, upon the application of the defendant, without requiring him to make oath or give bail, such adjournment will be deemed an irregularity.

The effect of an irregular and unauthorized adjournment is that the cause is out of court, and the justice loses jurisdiction.

A party will not waive his objection to an irregular adjournment, by renewing his old subpoena.

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APPEAL from a judgment of the Orleans county court, affirming a judgment of a justice of the peace.

Church & Savage, for the plaintiff.

B. L. Bessac, for the defendant.

By the Court, MARVIN, J. Upon the return of the summons in the justice's court the parties appeared and joined issue, and the defendant moved for an adjournment. The plaintiff objected, and demanded that the defendant make oath and give bail, in order to obtain the adjournment. The defendant refused to make the oath and give the bail demanded, and the court decided that it was not necessary for him to do so, in order to obtain an adjournment; and the court granted the adjournment, on the motion of the defendant, without oath or bail, and not on the motion of the court. The plaintiff then had his old subpoena renewed. The plaintiff did not appear on the day to which the cause was adjourned, and the defendant moved for a nonsuit. The court granted it, and rendered judgment against the plaintiff for costs \$1.70.

The justice was authorized, in this case, in his discretion, with or without the consent of the parties, to adjourn the cause not exceeding eight days. He had authority and is directed by the statute to adjourn the cause, in a case like the present, on the application of the defendant, upon his applying for the adjournment at the time of joining issue, and if required by the plaintiff, the defendant must make oath that he cannot safely proceed to trial, for the want of some material testimony or witness, to be specified by him; and he must also, if required by the plaintiff, give security. The adjournment is to be for a reasonable time not exceeding 90 days, (2 R. S. 238, 239, §§ 57, 64.) The adjournment in this case was for eight days. It is clear that the justice had the power, *in his discretion*, to make this ad-

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journalment without the consent of the parties. But it is equally clear that he did not exercise this discretionary power. He tells us, in his return, that the adjournment was moved for by the defendant, and the plaintiff demanded that the defendant should make oath and give bail, in order to obtain the adjournment; that the defendant refused, and he decided that it was not necessary for the defendant to make oath and give bail, in order to obtain an adjournment; and that he gave the adjournment on the motion of the defendant, and not on his own motion. The language of the return is too clear and precise to admit of any doubt. The justice supposed, and so decided, that the defendant was entitled to an adjournment without making oath or giving bail; or, in other words, that they were unnecessary to entitle him to the adjournment though the plaintiff so required. It is clear that the justice erred. What was the effect of this error?

It has often been decided that by an irregular unauthorized adjournment the cause is out of court, and the justice loses jurisdiction. (*Kimball v. Mack*, 10 *Wend.* 497. *Gamma v. Law*, 2 *John.* 192. *Aberhall v. Roach*, 11 *How. Pr. Rep.* 95.) In all the cases I have consulted, the question was raised by the defendant; but I am not able to see that this can make any difference. The plaintiff has a right to proceed to trial on the joining of the issue, unless the justice, in the exercise of the discretion confided to him, adjourns the cause on his own motion, or the defendant complies with the requirements of the statute. In my opinion the justice, by the error committed, lost jurisdiction of the cause.

I also think that the plaintiff, by having his old subpoena renewed, did not waive this unauthorized adjournment. He objected all he could, and the justice overruled him; and by obtaining a renewal of his subpoena he did not waive his objections. In *Fanning v. Trowbridge*, (5 *Hill*, 428,) there was an irregular adjournment granted at the plaintiff's re-

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quest. The defendant appeared on the adjourned day and answered to his name, but declined taking any part in the subsequent proceedings. It was held that the irregularity was not waived.

Upon the whole I think the judgment of the county court, and that of the justice must be reversed.

Judgment accordingly.

[**THIS GENERAL TERM, May 14, 1860. Marvin, Davis and Grover, Justices.**]

MAIN vs. GREEN.

Notwithstanding the act of April 14, 1860, which declares that the acts of 1805, of 1818 and of 1880, conferring upon grantees of demised lands and rents and the reversion thereof, and upon the heirs and assignees of the lessor and grantees, the remedies by entry, action or otherwise, for the non-performance of any agreement, or the recovery of any rent, and extending the benefits of these provisions to grants or leases in fee reserving rents, &c. "shall not apply to deeds of conveyance in fee, made before the 9th day of April, 1805, nor to such deeds hereafter to be made," an action of ejectment, for the non-payment of rent, may be brought by the assignee of the devisee of the grantor, upon a lease made previous to 1805, where the plaintiff had acquired the rights and remedies of the original lessor previous to the act of 1860.

The legislature did not intend, by the act of 1860, to take away rights already vested or acquired, under the previous statutes; especially those, to enforce which suits had already been brought.

It seems, the act of 1860 is to be limited to cases of rights acquired, or attempted to be acquired, under conveyances prior to 1805 and since 1860, by means of assignments or transfers made or executed since the passage of the act of 1860.

Although a mere right of entry is not assignable, so as to authorize an action by the assignee, in his own name, yet where a party, while the acts of 1805, 1818 and 1880 were still in force, and before the act of 1860 was passed, acquired by assignment the rights and remedies of the original lessor, for non-payment of rent and breach of conditions; *Held*, that such assignee was authorized by section 11 of the code, to maintain ejectment in his own name.

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A devise of all the testator's "lands, tenements, hereditaments and real estate situate in the manor of R," &c., together with "the appurtenances, rents, issues and profits thereof," is sufficient to transfer to the devisee rents due upon leases in fee.

An assignment of property in trust for the benefit of creditors, which conveys all the real estate of the grantor in a specified town, and all *leases*, and *reservations* and *rents* thereof, issuing therefrom, together with all *debts due* for rents of land in said town, passes to the assignee the covenants, conditions or right of entry contained in a lease in fee.

Rents reserved in a lease in fee are apportionable among the several tenants occupying the demised premises, *it seems*.

If rent is due upon such a lease ejectment will lie for its non-payment, against a tenant occupying only a portion of the land; who cannot object that the recovery is not for the whole tract embraced in the lease, or for land not in his possession.

The assignee of the original lessee is to be deemed the *owner* of the land and liable for the rent, notwithstanding he has given a mortgage upon the premises. Hence he is the proper person upon whom service of the notice is to be made, by the lessor or his assignee, under the act of May 13, 1846.

THIS action was ejectment, brought to recover of the defendant about 28 acres of land, in Petersburg, Rensselaer county. It was alleged and proved that on the 2d day of April, 1793, a deed was made, by and between Stephen Van Rensselaer, as party of the first part, and Jonathan Irish and Augustus Sheldon, as parties of the second part. By that deed the party of the first part granted, bargained, sold, remised, released and confirmed to the parties of the second part two lots of land, one of sixty-three acres, and the other of eighteen and eight-tenths: to have and to hold to the parties of the second part, their heirs and assigns forever. Irish and Sheldon, as parties of the second part, for themselves, their heirs, executors, administrators and assigns, covenanted, promised and agreed with the party of the first part, his heirs and assigns, to pay annually seven and one-half bushels of wheat. For the non-payment there was a clause or provision of distress, and of re-entry for the want of sufficient distress. The provisions of the deed were detailed and minute, and were such as are usual upon the lands in the manor of Rensselaerwyck, and were substantially similar

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to those recited in the case of *Van Rensselaer v. Hays*, (19 *N. Y. Rep.* 69.) The deed further contained a reservation of all mines and minerals, creeks, runs and streams of water, and other covenants and conditions than those above recited and referred to. The plaintiff then offered and read in evidence the last will and testament of the grantor in the foregoing deed, who died in 1839, showing that in 1839 the said grantor devised to William P. Van Rensselaer all his lands, tenements, hereditaments and real estate situate in the manor of Rensselaerwyck on the east side of Hudson's river in the county of Rensselaer, (which included the premises in question,) together with the appurtenances, rents, issues and profits thereof. The defendant objected that the will only passed the real property of the testator to his son William P., and did not pass the covenants, conditions or right of entry counted upon in the complaint. The objection was overruled, and the defendant excepted. The plaintiff also offered in evidence a deed of trust, dated September 25th, 1848, from William P. Van Rensselaer and his wife, purporting to convey to Alonzo White and others, in trust for the benefit of creditors "all their real estate" in certain towns, including Petersburg, "and all leases and reservations and rents thereof issuing therefrom, together with all debts due for rents of lands in the said towns." The defendant objected that the said trust deed did not pass the real estate claimed in this action, nor the covenants, conditions or right of entry reserved in the first named indenture. The objection was overruled, and the defendant excepted. The plaintiff then proved the conveyance to him of all the interest of the said assignees in and to the property mentioned in the said trust deed, and the back rent thereon. The plaintiff then read in evidence the record of a judgment rendered in the Troy justices' court, between the plaintiff and the defendant, on the 9th of April, 1855, for \$83.74 damages and costs, in an action for rent due upon the first mentioned grant, upon the premises claimed in this action. The defendant objected thereto

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as irrelevant and inadmissible. The court overruled the objection, and the defendant excepted. The plaintiff then proved the service upon the defendant, on the 8th day of August, 1858, of a copy of section 3 of the act to abolish distress for rent and for other purposes, passed May 13th, 1846, together with notice of default in the payment of the rent under such indenture or lease, and of his intention, as assignee or owner, to re-enter under said indenture and the act of 1846. The plaintiff was then sworn, and testified to the defendant's occupancy for about 23 years past of about 30 acres of the land described in the deed from Van Rensselaer, to Irish and Sheldon; that four years' rent was due since the justice's judgment, which, with interest, amounted to \$16 on the defendant's part. The defendant then proved a mortgage from himself and wife to one Russell J. White, of a date prior to the 8th of August, 1858, upon the premises claimed in this action, and other premises, for \$1200, not yet due.

The defendant moved for a nonsuit, upon several grounds, which motion was denied, and the decision excepted to by the defendant, upon the following grounds:

1. That the deed from Stephen Van Rensselaer to Jonathan Irish and Augustus Sheldon, dated April 2d, 1793, was a deed of assignment and not of lease, leaving no reversion in the grantor, and did not create the relations of landlord and tenant.
2. That the plaintiff has failed to prove any estate, title or interest in the premises sought to be recovered, and therefore he cannot maintain his action.
3. That the plaintiff has failed to prove any assignment or transfer of even the rents to himself. They did not pass by the devise of Stephen Van Rensselaer, deceased, to William P. Van Rensselaer. That devise merely passed real estate, which had a descriptive location: mere choses in action did not pass by it.
4. That the deed of William P. Van Rensselaer, to his assignees in trust for the benefit of his creditors, did not pass the covenants and conditions or right of re-entry contained

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in the deed from Stephen Van Rensselaer to Jonathan Irish and Augustus Sheldon, if such were ever vested in said Wm. P. Van Rensselaer. 5. That the right of re-entry for condition broken is a litigious right and not assignable. 6. That the payments claimed were not rent service, and if a rent charge, they were not apportionable, and the action therefore is not maintainable against the defendant to recover the portion of the lot possessed by him. 7. That the defendant was not the owner of the legal estate, but of the equity of redemption only, when the notice was served upon him, and subsequently; in other words he was not the assignee of the land, and therefore the action was not sustainable. 8. That chapter 98 of the laws of 1805, enabling grantees of reversions to take advantage of the conditions to be performed by lessees, and the subsequent re-enactments thereof having no application to the aforesaid deed in fee, made by said Van Rensselaer, to Irish and Sheldon, April 2d, 1793, this action is not maintainable. The court refused to nonsuit the plaintiff upon either or any of the grounds taken, and the defendant excepted upon each point separately and severally.

The testimony being closed, the court thereupon charged the jury that the plaintiff was entitled to recover from the defendant the possession of the premises described in the complaint and to have and to hold the same in fee; to which charge of the court the defendant excepted.

The court further charged the jury that there was due and unpaid from the defendant to the plaintiff for rent \$16, and directed the jury so to find, and the defendant excepted. And the jury, under the charge aforesaid, rendered a verdict for the plaintiff accordingly. To which the defendant also excepted.

On which order judgment was entered for the plaintiff in the clerk's office of Rensselaer county, June 29th, 1860, for the recovery of said premises, and \$90.83 costs.

The defendant thereupon appealed to the general term. And the cause was heard upon such appeal and the exceptions.

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W. A. Beach, for the plaintiff.

A. Bingham, for the defendant.

By the Court, HOGEBOM, J. Several of the questions discussed at bar seem to have been expressly adjudicated either in this court or the court of appeals. So far as they have been so, they must be deemed at rest, and not open to further discussion. There must be a period when discussion shall cease, and decision shall be practically conclusive, not merely between the parties to the particular suit, but as a precedent and a rule of action for other cases.

The case of *Van Rensselaer v. Ball*, (19 *N. Y. Rep.* 100,) was in all material respects, except a single particular, like the present case. It was an action of ejectment for non-payment of rent upon a lease or grant in fee. There was, as in this case, a covenant for the payment of rent, and clauses of distress and re-entry in default thereof. The parties in that case, as in this, claimed under the Van Rensselaer title. The plaintiff in that case was the devisee of the grantor, and the defendant was the son of the deceased grantee, having entered into possession under him. In this case the title is on each side one remove farther from the original parties, but the questions are similar, to wit, whether the covenants run with the land, and bind the successors of the original parties, taking title to and holding under the original instrument. In each case rent had been paid during the lease—the difference, if any, being in favor of the plaintiff in the present action, to whom rent had been paid in part by the present defendant, which was not so in the reported case. The very same questions now made and discussed were presented in that case. The only distinguishing feature that I am able to discover is as to the effect of the law of 1860 repealing or limiting the former statutes extending certain remedies to the grantees or assignees of reversions. (*Laws of 1860, ch. 396.*)

In the reported case above mentioned it was among other

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things held, that the condition of re-entry, in default of the payment of rent by the grantee, his heirs and assigns, reserved and payable to the grantor and his heirs upon a conveyance in fee, was a *lawful* condition; that it made the estate granted, an estate upon condition; that upon a breach of this condition, the grantor and his heirs might re-enter; that this doctrine was held in reported cases and in the treatises of elementary writers entitled to weight as authority, and was not inconsistent with any thing contained in the case of *Depeyster v. Michael*, (2 *Selden*, 467.)

It was further held that these reservations of annual payments for the land or its use were essentially *rents*; notwithstanding there was no reversion remaining in the grantor in the strict feudal sense, and consequently no right of distress at the common law, independent of the express right conferred by the terms of the conveyance; that it was termed rent by the early and authoritative writers on this subject, and was one of the recognized species of rent, being a valid rent charge; that it was a rent authorizing at the common law a re-entry where such right was given in the instrument under which the parties held. It was further assumed in that case, and decided in a previous case in the same volume, (*Van Rensselaer v. Hays*, 19 *N. Y. Rep.* 68,) that this rent was designed by the original parties to the instrument to be, and was by the terms of the conveyance and in legal effect, perpetual, and obligatory upon the successors of the original parties who held and claimed under the original conveyance; that taking the title and claiming the possession under the instrument and by descent, devise or assignment from the original parties thereto, the subsequent parties must take the same with the burthens, covenants, conditions and incidents imposed by the terms of the conveyance and the agreement of the parties, so long as they were not inconsistent with the rules of law, with fundamental notions of right, and with elementary principles of policy. And it was argued and held that it was obviously equitable and right that an

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annual rent, which was palpably a portion of the consideration for the purchase and perpetual use of the land, should be upheld as lawful between the original and subsequent parties, and capable of being enforced and secured as well by a direct proceeding for its recovery, as by the collateral remedy of ejectment upon the forfeiture of the premises by a breach of the covenants and conditions in the conveyance.

It was further held that no demand of rent according to the strict requirements of the common law was necessary in such a case; that the object of the statute making the service of a declaration in ejectment to stand in the place of a demand and re-entry, was to avoid "the many niceties which attend re-entries at common law;" and that the notice provided for in the third section of the act of 1846, (ch. 274,) stood in the place of the evidence of a want of goods upon which to distrain. (*See also Van Rensselaer v. Snyder*, 3 *Kernan*, 299.)

The references already made to the cases in 19 *N. Y. Rep.* 68, 100, which were cases, in one or the other of which all the preceding questions seem to have been directly involved, appear to dispose of all the points raised and argued at bar, except the effect of the act of the legislature passed April 14, 1860, which having been passed after the decisions above referred to and before the commencement of the present action, necessarily could not receive judicial construction in that case, but meets us in this, as a matter essential for decision. The substance of that act is that the previous legislative acts of 1805, of 1813 and of 1830, conferring upon grantees of demised lands and rents and of the reversion thereof, and upon the heirs and assignees of the lessor and grantees, the same remedies by entry, action or otherwise, for the non-performance of any agreement or the recovery of any rent, as their grantor or lessor might have had if the reversion had remained in him, and extending the benefits of these provisions to grants or leases in fee reserving rents, as well as to leases for life and for years, "shall not apply to deeds of con-

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veyance in fee made before the 9th day of April, 1805, nor to such deeds hereafter to be made." To appreciate and determine the applicability and effect of this act upon the present case it will be necessary briefly to retrace our steps.

This action is brought, not by the grantor or his heirs, but by the assignee of the devisee of the grantor. The defendant claims "that the right of re-entry for condition broken is a litigious right and not assignable." And Mr. Justice Denio, in the case already so freely cited, (19 *N. Y. Rep.* 103,) was of opinion (and very probably the court concurred with him) that "no one but the grantor or his heirs could, at common law, enter for the breach of a condition subsequent;" citing *Litt. sec. 347*; *Co. Litt. 214 b*; 4 *Kent's Com.* 127; *Nicoll v. New York and Erie R. R. Co.* (2 *Kern.* 121.) He proceeded to show that the acts of 1805, of 1813 and of 1830, above referred to, and claimed to be repealed by the act of 1860, conferred "upon the assignees of a grantor reserving rent the remedy by entry for the non-payment of such rent precisely as the grantor himself had it before he parted with the right." (*Page* 105.)

In reference to this act of 1860 there are several observations which seem to be applicable. 1. The words in the act in question are not that the previous statutes are repealed, or repealed even as to conveyances before 1805 and after 1860, but that those statutes shall not *apply* to such conveyances, and it is suggested to me by my brother Gould, and the suggestion is not without force, that there is a material difference in the description of the conveyances upon which the act is designed to operate, the language in the act of 1860 being "deeds of conveyance in fee," and in the former acts "grants or leases in fee reserving rents." 2. I doubt if the legislature by this act of 1860 intended to take away rights already vested or acquired, and especially such, as in the present case, which suits had been already brought to enforce. The right had been already acquired, and according to the decision of this court in *Van Rensselaer v. Smith*, (27 *Barb.* 152,) the leg-

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islature had established a "privity of contract" between the assignees of the original parties, and of course had conferred the rights incident to such a relation; and it had established the assignability of the lessor's interest, and of the remedies connected with its maintenance and enforcement. These were important rights which had been recognized by the legislature and acted on by the parties, and the statute now under consideration should not be readily construed as unsettling previously acquired rights. (*Dash v. Van Kleeck*, 7 John. 477. *Sayre v. Wisner*, 8 Wend. 661. *Wadsworth v. Thomas*, 7 Barb. 445. *Salters v. Tobias*, 3 Paige, 338. *People v. Supervisors of New York*, 2 Smith, 424. *Ely v. Holton*, 1 id. 595. *Quackenbush v. Danks*, 1 Denio, 128. S. C., 3 id. 594; 1 Comst. 129.) In *Johnson v. Burrell*, (2 Hill, 239,) it is said "it is a general rule that a statute affecting rights and liabilities should not be so construed as to act upon those already existing." In *Wood v. Oakley*, (11 Paige, 403,) it is said "Courts of justice will apply new statutes only to future cases which may arise; unless there is something in the nature of the new provisions adopted by the legislature, or in the language of such new statutes, which shows that they were not intended to have a retrospective operation." In *Berley v. Rampacher*, (5 Duer, 183,) it is said that no enactment, however positive in its terms, is to be so construed as to interfere with existing contracts, rights of action or suits, unless it expressly declares that intention. There will be scope and verge enough for the operation of the act of 1860 if it is limited to cases of rights acquired or attempted to be acquired under conveyances prior to 1805 and since 1860, by means of assignments or transfers made or executed since the passage of the act of 1860.

3. The remedy by ejectment is but a mode of enforcing the covenant for the payment of the rent, or for taking advantage of the breach of the condition. If, as is maintained in very many cases, these covenants, with their incidental remedies, run with the land, then they are essentially and in effect new

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covenants between the new parties; especially when recognized and treated as obligatory by the payment of rent in conformity with their requirements. Independent, therefore, of any of these statutes, if this view be correct—if they bind the land and are obligatory upon the subsequent and (so to speak) derivative parties—there is no occasion for resorting to these statutes for aliment to support the present action. (*Watts v. Coffin*, 11 *John*. 495. *Lush v. Druse*, 4 *Wend*. 313. *Van Rensselaer v. Bradley*, 3 *Denio*, 135. *Van Rensselaer v. Jones*, 5 *id.* 449. *Van Rensselaer v. Gallup*, *Id.* 454. *Van Rensselaer v. Roberts*, *Id.* 470. *Van Rensselaer v. Jewett*, 2 *Comst.* 135. *Same v. Same*, 5 *Denio*, 121. *Van Rensselaer v. Hayes*, *Id.* 477. *Van Rensselaer v. Snyder*, 3 *Kern*. 299.)

4. It is observable that by the act of 1860 only section 25 of chapter 1, title 4, part 2 of the revised statutes is repealed or limited; leaving the leading and important section, § 23, to stand. (3 *R. S.* 37, 5th ed.) Section 25 is substantially and only the act of 1805; it was professedly only a *declaratory* act, and passed to *remove doubts* as to the applicability of the previous act to grants and leases in fee. The very passage of the act implies a legislative opinion that the previous act was broad enough, when construed according to its spirit and intent, to reach grants and leases in fee, and that the later act of 1805 was enacted for more abundant caution. And the scope of the opinions both in this court and in the court of appeals, on these remedial or enabling acts, leads to the conclusion that the remedy by entry and ejectment for conditions broken, was granted to assignees of the lessor under grants or leases in fee, independent of the act of 1805. (See Judge Gould's opinion in *Van Rensselaer v. Smith*, 27 *Barb.* 151–153; Judge Wright's opinion in the same case, p. 170–173; Judge Denio's opinion in *Van Rensselaer v. Hays*, 19 *N. Y. R.* 82–84, and 92–94; and his opinion in *Van Rensselaer v. Ball*, *Id.* 103–105.)

5. It appears to me also, notwithstanding the doubt ex-

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pressed by Judge Denio, in *Van Rensselaer v. Ball*, (19 *N. Y. Rep.* 104,) that the provisions of the code (§ 111) cover this case, and authorize this action to be brought in the name of the present plaintiff. It may be admitted that a mere right of entry is not assignable so as to authorize an action by the assignee in his own name; but while the acts of 1805, 1813 and 1830 were still in force, and before the act of 1860 was passed, the plaintiff lawfully acquired the rights and remedies of the original lessor for non-payment of rent and breach of conditions. Those rights were not taken away by the act of 1860, and the code requiring *all* actions to be brought in the name of the real party in interest, this action (if maintainable at all) was rightfully brought in the name of the present plaintiff, and could be brought in the name of no other person.

I have thus endeavored to discuss or dispose of all the material questions raised by the defendant, in this case. There are one or two, however, perhaps not directly covered by what has been said.

It is said that the plaintiff failed to prove any assignment or transfer of the rents to himself, inasmuch as the devise of Stephen to William P. Van Rensselaer merely passed real estate which had a descriptive location. On looking at it, however, it is seen to be a devise of tenements and hereditaments, as well as of lands; which clearly would embrace rents. The language "situate in the manor of Rensselaerwyck on the east side of Hudson's river," means more particularly that the *lands* are there situated, but is not inapplicable or inappropriate to *rents* arising out of those lands. In addition to this, the *rents*, *issues* and *profits* of his real estate there—which would include all his interest in real estate of any description there—are also expressly devised to William P. Van Rensselaer. This objection is not well taken.

Again; it is said that the deed of W. P. Van Rensselaer to his assignees in trust for his creditors did not pass the covenants, conditions or right of re-entry contained in the grant

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in fee under consideration. Though covenants, conditions and rights of re-entry were not expressly named in the deed, I think they were sufficiently covered by the expressions used. It was a deed of all that *real estate* in the town in question, and all *leases* (which I think would carry the *contents* of the leases and the rights and remedies therein reserved) and *reservations* and *rents* thereof issuing therefrom, together with all *debts due* for rents of lands in said town.

Again; it is said that the rents were not apportionable. I think they were; but if not, *rent* would nevertheless be due, and ejectment would lie for its non-payment, and would lie against the defendant as occupant of the land. I do not see that he could object that the recovery was not for the whole tract embraced in the lease, or for land not in his possession. This objection is not available.

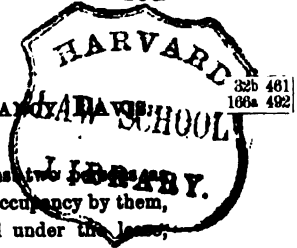
And lastly, it is said that the defendant having given a mortgage of the land (though the same was not yet due) he was not the owner of the land or of the legal estate therein, but of the equity of redemption merely, when the notice was served on him, and therefore was not the assignee of the land.

By our law he was the *owner* of the land, and the mortgagee had only the equitable title. (*Astor v. Miller*, 2 *Paige*, 77. *Morris v. Mowatt*, *Id.* 586. *Gardner v. Heartt*, 3 *Denio*, 232. *Waring v. Smyth*, 2 *Barb. Ch.* 135. *Calkins v. Calkins*, 3 *Barb.* 305. *Bryan v. Butts*, 27 *id.* 505.) He was also the occupant of the land. He was the assignee of the original lessee—liable for the rent (which the mortgagee was not)—and recognizing such liability had paid a part of the rent. I think he was the proper person upon whom service of the notice was to be made, under the act of May 13, 1846.

The judgment of the circuit court must be affirmed.

[ALBANY GENERAL TERM, September 8, 1860. *Gould, Hogeboom and Peckham*, Justices.]

JAMES T. MAIN *vs.* ASA C. DAVIS and NANCY A. DAVIS.



Where in covenant for rent due upon a lease in fee, against two joint occupants of the premises, there is proof of a joint occupancy by them, and of an acknowledgment by both that they occupied under the lease, this is sufficient prima facie evidence that they held as assignees.

The assignee of a part of the premises embraced in a lease in fee, is liable for his proportionate part of the rent reserved, where the evidence does not show who the other owners of the demised premises, if any, are, and there is reason to conclude that the portion of the premises occupied by the defendants devolved upon them by operation of law.

The utmost effect of the act of April 14, 1860, (*Laws of 1860, ch. 396.*) is to limit the application of the act of 1805 to deeds executed between 1805 and 1860. It was not the intention of the legislature that the act of 1860 should apply to rights acquired and vested before its passage; especially where suits to enforce those rights had been commenced previous to the passage of that act.

Independent of the act of 1805 or its subsequent re-enactments, the assignee of the grantor in a lease in fee may, under the provision of the code of procedure abolishing the distinction between legal and equitable remedies and requiring all actions to be brought in the name of the real party in interest, maintain an action against an assignee of the lessee for the recovery of rent.

THE plaintiff set forth, in his complaint, a conveyance in fee reserving rent, with covenants on the part of the grantee, his heirs and assigns, to pay said rent to the grantor, his heirs and assigns, and containing also clauses of distress and re-entry in default of payment. The conveyance was substantially like that contained in *Van Rensselaer v. Hays*, (19 *N. Y. Rep.* 68.) The complaint among other things alleged that Stephen Van Rensselaer, in 1797, sold and conveyed in fee to Josiah Granger a certain farm in Berlin in the county of Rensselaer, and that Granger covenanted to pay therefor, as rent, annually, fourteen and eight-tenths bushels of wheat. That in 1855 this same estate in fee, which had been purchased by and conveyed to Granger, was assigned to the defendant, in a part of the premises. That the plaintiff became assignee of the covenants and of all the interest of the grantor, in 1853. Upon that state of facts the plaintiff claimed that the defendants were liable to pay

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him from 1843 to 1859, a part of the wheat so covenanted to be paid by Granger, and for the purpose of compelling such payment brought this action.

Upon the trial the plaintiff proved the sale and conveyance to Granger, as alleged. To prove that the plaintiff was the assignee of the covenants, he offered the will of the grantor, Stephen Van Rensselaer, deceased. By that will it appeared that the testator had devised all his lands, tenements and real estate, in Rensselaer county, to his son William P. Van Rensselaer, together with the appurtenances, rents, issues and profits thereof. The plaintiff also offered in evidence a deed from William P. Van Rensselaer to White and others, in trust for the benefit of creditors, which purported to convey all the real estate of the grantor within certain towns, including Berlin, and all leases, reservations and rents thereof, issuing therefrom, together with all debts due for rents of land in said towns. The will and the deed were both objected to by the defendants, upon the ground that they did not pass the causes of action counted upon in the complaint. The objection was overruled and the defendants excepted. The plaintiff himself testified that the defendants occupied 68 acres, and had done so since 1843; that Robert Davis occupied that portion before that time; that Nancy Davis was on there as the widow of Robert Davis; and that each had told him that they held the 68 acres under the lease, and that \$249.60 was the proportionate amount of rent and interest due on the 68 acres. Upon this state of facts the plaintiff claimed to recover \$249.60 as the proportionate amount upon 68 acres. The defendant moved for a dismissal of the complaint against Nancy Davis, as she occupied only as widow. Motion denied, and the defendant excepted. The defendant moved for a nonsuit, on the following grounds:

1. The deed was a deed of assignment, leaving no reversion in the grantor; the relation of landlord and tenant was not created, and there was no privity of estate or of contract.
2. The plaintiff had no interest in the estate, rents or cove-

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nants. 3. The devise to W. P. Van Rensselaer was insufficient to pass them. 4. As also was the deed of W. P. Van Rensselaer to his assignees. 5. The payments claimed were not a rent service, and as a rent charge were not apportionable. 6. The defendants are owners of the land, and not the tenants of the plaintiff. 7. The law of April 14, 1860, shows that the act of 1805 and its subsequent re-enactments do not apply to the present deed. Motion for nonsuit denied, and the defendant excepted. The court instructed the jury to find a verdict for the plaintiff for \$249.60, to which the defendants excepted. The jury found a verdict accordingly, on which judgment was entered, and the defendants appealed therefrom.

A. Bingham, for the appellants.

W. A. Beach, for the plaintiff. •

By the Court, HOGESBOM, J. The questions arising in this case are most of them similar to those in the case of *Main v. Green*, just disposed of. (a) So far as they are so, they require no further remark. The only points of difference seem to be: 1. That this is an action of covenant to recover the rent, and not ejectment to recover the premises. 2. That the defendant Nancy Davis is claimed to have been in possession only as widow, and not as a joint occupant with Asa C. Davis. 3. That the annual payments (of rent) if liable to be made at all, were a rent charge, and therefore not apportionable. 4. That the act of 1860 having declared the act of 1805 and its subsequent re-enactments not to be applicable to conveyances made before 1805, leaves no ground upon which the plaintiff can recover.

To avoid confusion it will be convenient to consider these points in the order above stated.

1. The first point made by the defendants is that the deed

(a) *Ante*, p. 448.

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from Van Rensselaer to Granger, of January 21, 1797, is a deed of assignment, and not of lease or subinfeudation, leaving no reversion in the grantor, and did not create the relations of landlord and tenant, and there being neither privity of estate, nor privity of contract between the plaintiff and the defendants, the defendants are not liable.

These objections are all disposed of by the decision of the court of appeals in *Van Rensselaer v. Hays*, (19 *N. Y. Rep.* 68.) In that case the action was covenant, to recover rent upon a conveyance in fee by the devisee of the lessor against the assignee of the lessee of part of the premises. The instrument upon which the right to recover was based, was in all material respects like the one under consideration. The questions presented were substantially similar, and the court of appeals held the plaintiff entitled to recover. They held 1. That it was the manifest design of the parties to the instrument to create relations which should exist in perpetuity and to impose the obligation to pay the rent and confer the right to receive the rent upon the heirs and assigns of the original parties; and that it was the object of the legislative act of 1805 to recognize the long existence and validity of such relations, and to make the grants available according to the intention of the parties. (*Id.* 71.) 2. That while under such an instrument there was no reversion in the grantor in the sense of the law of tenures, and therefore no right of distress at common law, yet the right of distress and re-entry being conferred by the terms of the deed, the rent was a valid rent charge and available to the grantor by means of the clause of distress. (*Id.* 76, 77.) 3. That this rent, though not strictly an estate in the land, was nevertheless a hereditament and descendible to the heirs of the grantor. (*Id.* 77 to 79.) 4. That while some English cases, and the authority of Sir Edward Sugden, led to the conclusion that the covenant to pay the rent, in an instrument of this character, was a covenant annexed to the thing granted, and ran with the rent in the hands of an assignee, the rent charge being

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an incorporeal hereditament issuing out of the land and the land being bound by it, nevertheless doubt was thrown upon the correctness of that proposition as being the law of this state by the case of *Devises of Van Rensselaer v. Executors of Platner*, (2 John. Cas. 26.) But this being the state of things, the statute of 1805 was passed, giving to grantees of lands and rents and the reversion thereof and the assignees of the lessor, in grants or leases in fee reserving rents, as had been before done in leases for life or years, the same remedies by *entry, action, distress* or otherwise, for the non-performance of any agreement in the lease or grant, or the recovery of any rent, or for the doing of any act of forfeiture, as their grantor or lessor had or might have had if the reversion had remained in him; that the act was constitutional, and the legislature had a right to consider the interest of a grantor in fee reserving rent as a *reversion, pro hac vice*, if it thought proper to do so; and that as a result of this legislation, whether it would have been so at common law or not, the *devisee* of Van Rensselaer (and by consequence any *other assignee* of the lessor) had a right to sue any one upon whom that covenant was binding. (*Id.* 79 to 86.)

5. That it was a debated question in the English courts whether an assignee of the grantee in such an instrument was liable upon the covenants in the deed, and it was the conclusion of Sir Edward Sugden, upon a review of the English cases, that he was; that the argument of the defendant that such covenants cannot by any form of stipulation in the deed be made to run with the land, except there be a reversion in the covenantee, does not rest upon any sound reason; that there exists a certain kind of privity between the parties; that the second section of the "act to enable the grantees of reversions to take advantage of the conditions to be performed by the lessees," taken in connection with the act of 1805, "establishes a privity of contract between those holding a derivative title under both grantors and grantees, and the

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intention of the legislature, apparently, was to place the assignees of both parties upon grants in fee where a rent was reserved, upon the same footing which was occupied by the assignees of the parties to a lease for life or years under the statute of Henry 8th, and the re-enactment of it in this country." That the course of adjudication in this state for a long series of years assumed and established the liability of assignees of the grantee, upon grants or leases of this description, for the rent accruing after the assignment, and "necessarily affirmed that these covenants, as to their burden, ran with the estate of the grantee in the land; as those referred to under the preceding head determined that their benefit accompanied the estate of the grantor in the rents." That these decisions accorded with the expressed intent of the parties to the conveyance, and established a rule of property from which it would now be unsafe and improper to depart. They therefore held that the defendant, as the assignee of the lessee of a portion of the land granted, was liable in this action for a breach of the covenants. (*Id.* 86 to 94.)

I have quoted thus freely from the substance and in many instances from the language of the opinion of the court in the case above referred to, for the purpose of showing that all the more material questions presented on this argument were expressly disposed of and necessarily decided in the case of *Van Rensselaer v. Hays*; and with the view of grouping together in a somewhat more compact form the conclusions and some of the reasons of the court in that case.

These questions cannot be regarded as any longer open to discussion in this court. They have been settled by a superior tribunal, and must form the rule of action for us. It would be fruitless—perhaps indecorous—to examine at length the reasons upon which they are founded. It is sufficient to say that the questions are learnedly and ably discussed, and that the conclusions arrived at commanded the concurrence of all the judges who took part in the decision of the case.

2. It is urged that the defendant Nancy Davis was entitled

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to judgment, and not liable to the plaintiff, not being an assignee of the lessee.

But the uncontradicted proof is of a joint occupancy by the defendants, and an acknowledgment by both that they occupied under the lease. This is sufficient *prima facie* evidence that they held as assignees. (*Quackenboss v. Clarke*, 12 *Wend.* 555. *Acker v. Witherell*, 4 *Hill*, 112. *Lush v. Druse*, 4 *Wend.* 318. *Armstrong v. Wheeler*, 9 *Cowen*, 88.)

3. It is objected that the rents are not apportionable, being a rent charge, and that therefore the plaintiff cannot recover. The court of appeals has decided, in the very recent case of *Van Rensselaer v. Chadwick*, (*MS. September Term 1860*), that as a general rule rent charges are not apportionable. But that case also recognizes a well established exception to the general rule, to wit, that when the division of the land into parcels occurs by operation of law, and not by the act or release of the parties, an apportionment takes place. It is not unfair to conclude in this case that the portion of land occupied by the defendants in this case devolved upon them by the death of Robert Davis, the father of Asa C. Davis, and the proprietor of the entire tract, or of that portion occupied by the defendants as their proper proportion of the estate of the deceased. But assume that an apportionment cannot legally be made, does it prevent the plaintiff's recovery; or would not the consequence rather be in the present state of the proof, that the defendants would be liable for the whole rent? The evidence does not show who the other owners, if any, are; and there is therefore no reason for dismissing the complaint upon that ground. And it certainly is not apparent why the defendants are not liable for the rent—at least in part—and if not capable of division, then for the whole. In the case of *Van Rensselaer v. Hays*, (19 *N. Y. Rep.* 68, 99) the defendant was held liable as assignee of a part of the premises; although this question of apportionment was not discussed in the opinion of the court and possibly may not have been presented on the points.

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The general doctrine that rents in similar leases are apportionable has been held in several adjudicated cases. (*Van Rensselaer v. Bradley*, 3 Denio, 140. *Van Rensselaer v. Gallup*, 5 id. 454. *Van Rensselaer v. Chadwick*, 24 Barb. 334. *Astor v. Miller*, 2 Paige, 78. *Van Rensselaer v. Jones*, Id. 643.)

4. The effect of the act of 1860 (*Laws of 1860, ch. 396*) upon the right to bring the action remains to be considered. The utmost effect of that act is to limit the application of the act of 1805 to deeds executed between 1805 and 1860. I have discussed its bearing and operation upon these grants or leases in fee in the case of *Main v. Green*, and the remarks there made are applicable to this case. I endeavored among other things to show, independent of the phraseology of the act, which left it doubtful whether it was applicable to grants or leases in fee reserving rents, that it was not probable that the legislature designed the act to apply to rights acquired and vested before its passage; and if the court of appeals is right in supposing that the legislature by the act of 1805 virtually established a *reversion* as the interest of the grantor in a grant in fee reserving rent, (p. 83), and a *privity of contract* between those holding a derivative title under both grantors and grantees, (p. 92,) I apprehend it was impossible for the legislature, by what they have done in the act of 1860, to overthrow that relation, or the rights which have grown up under it; especially in cases like this, where suits were commenced before the passage of the act. (*Palmer v. Conly*, 4 Denio, 374; *S. C. 2 Comst.* 182. *Bradstreet v. Clarke*, 4 Wend. 211. *Aymer v. Gault*, 2 Paige, 284.) At least it is so improbable that they intended to do so that we are bound to assume the contrary, until more explicit evidence of such intent is supplied. (*Jarvis v. Jarvis*, 3 Edw. 462. *Wadsworth v. Thomas*, 7 Barb. 445. *Salters v. Tobias*, 3 Paige, 338. *Berley v. Rampacher*, 5 Duer, 183. *Wood v. Oakley*, 11 Paige, 400. *Johnson v. Burrell*, 2 Hill, 238.) However that may be, I do not see that the

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plaintiff is dependent upon the act of 1805 or its subsequent re-enactments, for the maintenance of the action. The case of *Van Rensselaer v. Hays*, before cited, holds, that at all events the parties bound to pay the rents were liable, independently of the statute, to an action at the suit of the original grantor and his heirs; that in *equity* they were transferable, and transferred to the subsequent owners of the rents, and that the code of procedure by abolishing the distinction between legal and equitable remedies and requiring all actions to be brought in the name of the real party in interest, conferred upon the plaintiff the necessary legal capacity to institute the action. (19 *N. Y. Rep.* 85.)

The course of legal adjudication seems to have left no ground upon which the defendant can securely stand, and the result is that the judgment of the circuit court must be affirmed.

[ALBANY GENERAL TERM, September 8, 1860. *Gould, Hogeboom and Peckham, Justices.*]

 VAN RENSSELAER vs. SECOR.

32b 489
160a 492

Where the execution of a deed is duly proved, and it is read in evidence, on the trial, without objection, it is too late to object, at the close of the case, that the plaintiff has not shown a *delivery*. Execution includes delivery.

Proof of payment of rent, upon a lease in fee, by the immediate grantor of the occupant, sufficiently establishes the existence and validity of the instrument, as against the tenant in possession; especially when taken in connection with the giving of a mortgage upon the demised premises, by the latter to his grantor, which secures the repayment of any rent the mortgagee may pay to the original lessor.

Such mortgage is proper evidence, in an action against the mortgagor for rent, as proof of his claim and title to the premises; of his derivative title under his immediate grantor; as some evidence of the quantity of land; and as some evidence of the recognition of the plaintiff's title and rent.

Where it is shown that the defendant is in possession of the demised premises; that he took title from one who was in under the plaintiff; and that he has mortgaged the land in an instrument which recognized the original lessor's rent, this is sufficient proof of his being the assignee of the lessee.

Van Rensselaer v. Secor.

THE plaintiff alleges in his complaint that on the 22d day of September, 1792, Stephen Van Rensselaer granted, bargained, sold, remised, released and confirmed to one Timothy Cooper a certain farm of about 176 acres of land in Berne, Albany county. That the said Cooper covenanted for himself, his heirs and assigns, to deliver to the grantor thirty skipples of wheat and four fat fowls, and to perform one day's service with carriage and horses for his vendor annually. The plaintiff claims to be the assignee of the covenants of the purchaser under that deed, and alleges that the defendant was a subsequent purchaser and owner of the same land and of all the interest of the original lessee or grantee, and after becoming such purchaser, and while owner under such purchase, the defendant became liable to fulfill and perform the covenants of Cooper, the former purchaser and owner. To prove the sale to Cooper, and Cooper's covenants, the plaintiff offered in evidence a deed in fee signed by Van Rensselaer and Cooper of the date of September 22, 1792, reserving rent, containing the usual covenants on the part of the grantee and his assigns to pay the rent and perform the covenants, and clauses of distress and re-entry in default of payment of the rent. The deed was read in evidence without objection, but was subsequently proved to have always been in the possession of the plaintiff and his testator, since 1832, McPherson, the defendant's grantor having made payments of rent thereon. The plaintiff then offered in evidence the record of a mortgage made by the defendant to John McPherson, of the date of April 30, 1844, whereby the defendant mortgaged all his interest in the premises to McPherson, and among other things to secure any patroon's rent McPherson might pay. The plaintiff then offered in evidence the will of S. Van Rensselaer deceased, showing that the testator devised to the plaintiff all his real estate, lands, tenements and hereditaments situate in the manor of Rensselaerwyck, on the west side of Hudson river, with the rents, issues and profits thereof.

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The defendant moved for a nonsuit on these grounds:

1. The deed was one of assignment, leaving no reversion in the grantor, creating no relation of landlord and tenant nor any privity of contract or estate.
2. The rents were not rent service and the covenants did not run with the land.
3. The plaintiff is not the owner of the covenants. They were mere choses in action, and did not pass by the devise, which was of real estate only.
4. The plaintiff has failed to show a delivery of the deed whereon he seeks to recover.
5. This is not rent service. Whether it be a rent charge or a rent seck, it is not apportionable.
6. Covenants run with the land only when the relation of landlord and tenant exists, and where there are two estates, with one of which the covenant runs as a benefit, and with the other as a burden. Hence there is no estate in the plaintiff.
7. The legal estate was not in the defendant but in McPherson, when the alleged covenants are claimed to have accrued, and the defendant, as owner of the equity of redemption under the mortgage, is not liable.
8. There is no evidence of title in the defendant when the alleged covenants are claimed to have accrued.

The court refused to nonsuit, and the defendant excepted. The defendant rested. The court thereupon found the following facts and conclusions of law: That the indenture or lease in fee alleged in the complaint was executed and delivered by the parties respectively thereto as alleged in the complaint. To this decision the defendant excepted. That the grantee or lessee became seised and possessed, thereunder, of the demised premises. To this decision the defendant also excepted. That the lessor or grantor, Stephen Van Rensselaer, died on the 26th day of January, 1839. That by his will and testament duly executed and the subsequent assignments, grants and conveyances, as alleged in the complaint, the plaintiff became seised in fee, and owner of the rent reserved in and by said lease or indenture, at the times respectively alleged in the complaint. To this decision the defendant also excepted. That the defendant before the first

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day of January, 1845, by assignment, became owner of all the estate and interest of the lessee in the whole of said demised lot number 481, as leased or granted to Timothy Cooper, except two acres, and continued such assignee until the time of the commencement of this action. To this decision the defendant also excepted. That the proper proportion of the rent accrued for and on account of the lands aforesaid, of which the defendant was assignee as aforesaid, for the period above stated, amounted with the interest thereon, to the sum of six hundred and twenty-four dollars and eighty-four cents, which sum was due from the defendant to the plaintiff. To this decision the defendant also excepted. Judgment was duly entered for the plaintiff on the finding of the court, for \$719.45, on the 16th day of December, 1859, and the defendant appealed therefrom to the general term.

C. M. Jenkins for the plaintiff.

A. Bingham for the defendant.

By the Court, HOGEBOM, J. The fundamental propositions on which the defendant relies to bar the plaintiff's recovery, have all been considered and held untenable in the cases of *Main v. Green*, and *Main v. Davis*,^(a) and need not be reconsidered. Those peculiar to this case may be briefly disposed of.

1. It is alleged that the plaintiff failed to show a *delivery* of the deed whereon he seeks to recover. The execution of the deed was duly proved, and it was read in evidence without objection. That included the question of delivery, and the objection at the close of the case came too late. The plaintiff further proved the payment of rent *thereon* by John McPherson, the immediate grantor of the defendant. This sufficiently established the existence and validity of the instrument; especially when taken in connection with the mort-

(a) See ante, pp. 448, 461.

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gage of the same premises by the defendant, and the recitals in the mortgage.

2. The mortgage was proper evidence, for the reasons stated in the plaintiff's points, to wit, as evidence of the defendant's claim and title to the premises—as evidence of the defendant's derivative title under McPherson—as some evidence of the quantity of land—and as evidence of the recognition of the plaintiff's title and rent.

3. The defendant was sufficiently shown to be the assignee. He was in possession himself; he took title from McPherson who was in under the plaintiff; he mortgaged the land, in an instrument which recognized the patroon and rent. (9 *Cowen*, 88. 4 *Wend.* 318. 12 *id.* 555. 4 *Hill*, 113.)

4. The statute of 1860 cannot affect the case. The plaintiff's claim had passed into a judgment and become a vested right. (*Dwar. on Stat.* 676. 1 *Hill*, 332. 2 *id.* 238. 5 *Duer*, 183.) Nor was the statute of 1805 essential to support the plaintiff's claim. (*Main v. Davis*, above referred to.)

The judgment of the circuit court must be affirmed.

[ALBANY GENERAL TERM, September 8, 1860. *Gould, Hogeboom and Peckham*, Justices.]

THE PEOPLE, *ex rel.* Lefever, *vs.* THE BOARD OF SUPERVISORS OF THE COUNTY OF ULSTER.

The proceedings by mandamus are not affected by the code, but must be regulated by the rules of pleading and practice prevailing previous to its adoption.

The return to the writ must set forth the title or justification of the defendant for not doing the act, the performance of which is sought to be enforced by the writ.

It should state all the material steps taken by the defendant, just as they occurred; and should, in itself or by express adoption of the allegations in the writ, either in whole or in part, state the case which makes out the defendant's justification.

Such return may set up any number of facts, constituting as many good reasons for not performing the act which the writ seeks to compel; provided they exist in point of fact.

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The argument *ab inconvenienti* is never of very great weight; of none against the positive injunctions of a statute.

The law having said that the justice before whom proceedings for the re-assessment of damages occasioned by the laying out of a highway are instituted, shall consummate them, the mandate must be obeyed; and the absence of such justice, so that he cannot be found, or induced to certify the verdict of the jury, in the form required by the statute, will not authorize another justice to certify the verdict.

THE relator sued out an alternative mandamus, requiring the defendants to audit and levy the sum of \$990 damages, re-assessed to the relator, for the laying out of a highway over his premises, or show cause &c. The writ alleges the laying out of the highway—the assessment of the damages therefor, by commissioners; that the relator, feeling aggrieved, served a notice under § 85, 2 R. S., 397, 5th ed., asking for a jury to re-assess the damages, and specify a time when the jury would be drawn. That a jury was drawn pursuant to the notice, a list of whom was delivered to the relator, who delivered the same to “*a justice of the peace of the town of New Paltz,*” where the road was situated; who issued his summons to a constable, directing him to summon the jurors, and specify a time and place at which they would meet. That at the time and place specified “*the justice who issued the summons*” did draw by lot six of the persons attending to serve as a jury, who were sworn “*by the said justice:*” heard the testimony of such witnesses as were offered by the parties, and sworn “*by the justice,*” and rendered their verdict in writing, which was certified “*by the justice,*” whereby they determined and re-assessed the damages of the relator at \$990. That the verdict was duly laid before the board of supervisors, &c. who refused to audit the same, &c.

The answer or return of the defendants alleged, 1. That the town of Plattekill, within which the jury were (to be) drawn was not an adjoining town to New Paltz in which the highway was situated; 2. Denied that the town clerk deposited in a box the names of all such persons residents of the

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town, who were not interested in the lands, nor of kin to either of the parties; 3. Alleged ignorance of the list from which the names were drawn, but alleged that one of the names drawn was that of Wellington Baxter, then and for a long time a resident of Newburgh, in the county of Orange, and not of Plattekill; and 4. Denied that Lefever delivered the certificate to a justice of New Paltz, alleged that the town clerk's certificate of the drawing of the jury was delivered to Philip S. Hasbrouck, of New Paltz, who was not a justice of said town, who issued the summons and attended to the drawing and swearing of the jury and witnesses, and that such summons was not issued, nor was such jury attended and sworn by any justice of the peace of the town of New Paltz; that only ten of the jurors appeared; that two of the six drawn were peremptorily challenged and objected to as partial, and biased in favor of Lefever, but were admitted and acted as jurors. That after all the witnesses produced by the relator, before the jury, had been sworn by said Philip S. Hasbrouck, claiming to act as justice of the peace, and they had been examined before the jury, the said Philip S. Hasbrouck, who had theretofore claimed to act as justice of the peace aforesaid, refused to swear the witnesses produced on the part of the commissioners of highways of New Paltz aforesaid, and the jury went on and assessed the damages upon the testimony thus before them; and 5. Denied that the verdict of the jurors was certified to by the said Philip S. Hasbrouck, who claimed to act as justice of the peace, as aforesaid, and claims said re-assessment to be irregular and void. They set up a further defense, not material to be here considered, that subsequently a certiorari was sued out from the supreme court to review such re-assessment, and the supervisor regarded the same as thereby removed from their jurisdiction, and did not act upon the same, but returned the papers to the supervisor of New Paltz, and had not in their possession any papers by which they could audit and collect the required damages.

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The relator, in his reply, 1. Denied the allegation in the return that Wellington Baxter was a resident of Newburgh, and concluded to the country. 2. Denied the allegation that Hasbrouck refused to swear the witnesses of the commissioners, and concluded to the country. 3. As to the allegation that the verdict of the jury was not certified to by said Philip S. Hasbrouck, the relator alleged that he ought not to be thereby barred, &c. because the commissioners of highways objected to the authority of Hasbrouck to act in said proceeding, and craftily and artfully procured him, the said Philip S. Hasbrouck, to refuse to sign the certificate, for the sole purpose of interrupting the proceedings and preventing the re-assessment. And the said Philip S. Hasbrouck thereupon (by the procurement of the commissioners and against the will of the said Abraham P. Lefever) absented himself from the place, and could not be found or induced by said Lefever to certify the verdict of said damages. Thereupon Henry Burnett, a justice of the peace of said town of New Paltz, who attended the said proceeding as justice, certified the verdict of the jury in the form prescribed by statute; and this he is ready to verify: wherefore he prays judgment. 4. He alleged that the certiorari aforesaid was, before the damages were laid before the board of supervisors superseded, and concluded with a verification. 5. Denied all the other allegations in the return, and concluded to the country.

To the reply above set forth and marked 3, the defendants demurred, and for cause of demurrer alleged; *First.* That the replication is a departure from and inconsistent with the allegations in the mandamus; it being alleged in the mandamus that the verdict of the jury was certified to by the justice who issued the summons and drew the jury; whereas, in the replication, it is admitted and alleged that the verdict was certified by another justice—Henry Burnett—and not by Philip S. Hasbrouck. *Second.* That it does not show a compliance with the statute, as it does not show or allege that the verdict was certified by the same justice who issued the

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summons and drew the jury. *Third.* That the replication shows that the statute was not complied with, and that the verdict was not certified by the justice who issued the summons and drew the jury.

The plaintiff joined in demurrer, at the hearing. At special term, the court gave judgment for the plaintiff on demurrer, with leave to the defendants to reply on payment of costs; from which order the defendants appealed to the general term.

E. Cooke, for the plaintiffs.

M. Schoonmaker, for the defendants.

By the Court, HOGEBOM, J. The proceedings by mandamus are not affected by the code, but must be regulated by the rules of pleading and practice prevailing antecedent thereto. (*Code*, § 471.) The writ must set forth, in substance, the title of the relator, and show a good reason for issuing the mandamus. (*People v. Ransom*, 2 *Const.* 490. *People v. Supervisors of Westchester*, 15 *Barb.* 608.) In this instance the writ appears to do so. The return must set forth the title or justification of the defendants for not doing the act, the performance of which is sought to be enforced by the writ. It must of course, in order to be available, set up a good and available defense or justification. The legal effect of the proceedings turns upon the allegations, in the return, of the subsequent proceedings. The return is supposed to set forth, and should set forth, all the material steps taken by the defendants, just as they took place. It should in itself or by express adoption of the allegations in the writ, either in whole or in part, state the case, which makes out the defendants' justification. (3 *R. S.* 898, 5th ed.) There is no provision for a *demurrer* to the writ, though for certain purposes it has the effect of a pleading; for example, when a demurrer is made to a return, the defendant may still have judgment, notwithstanding its insufficiency, if the writ be substantially

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defective. (*People v. Supervisors of Fulton*, 14 Barb. 52. *People v. Ransom*, 2 Comst. 490.) It is true, also, the defendant may, without a direct demurrer to the writ, have the benefit of such a demurrer by a motion to quash. (*Commercial Bank v. Canal Commissioners*, 10 Wend. 25.) The return is to be considered an *entirety*. (*The People v. Vail*, 1 Wend. 38.) I do not see why it may not set up any number of facts, constituting as many good reasons for not performing the act which the writ seeks to compel, provided they exist in point of fact. In this case the defendants undertake to allege three different defenses; one turning on the mode of making up the jury, and the members of which it was composed; another, (the one now in question) that the person officiating as justice, who initiated the proceedings, who issued the summons, who drew the jury and who swore the witnesses, did not consummate them by certifying the verdict; a third, that the proceedings were removed by certiorari into the supreme court, and thus placed beyond the jurisdiction of the supervisors. It is with the second defense alone that we have any concern on the present occasion; and I think, on the whole, the defense a sound one and well pleaded in the return. I say *on the whole*, because there is no *express* denial, in the return, of the allegation in the writ that the justice who issued the summons certified the verdict; but I think there is a sufficient denial by implication, by the averment of facts inconsistent with such a theory. For the return, in substance, alleges that Philip S. Hasbrouck was the officiating magistrate who issued the summons and conducted the proceedings, though he did not make the final certificate. And if no other legally could do so, then the officer who received the original jury list, as the defendants contend, or if such person was not in fact a justice of the town as the defendants also allege, then the defense is substantially complete. And I think the statute in substance requires, 1. That the town clerk shall deliver the jury list to the party seeking the reassessment of damages; and 2. That *such* justice shall

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issue the summons, draw the jury, swear the witnesses, and *certify* the verdict. That verdict, *thus authenticated*, is final, and furnishes to the supervisors the recognized authority for assessing the damages. (3 R. S. 398, 399, § 86 to 93, 5th ed.) To this *specific* defense, thus set up, the relator does not demur, but conceding its legal sufficiency, attempts to avoid its effect by plea; which plea is, in substance, that the commissioners of highways craftily and artfully procured the said Philip S. Hasbrouck to refuse to sign the certificate, in order to prevent the reassessment, and to absent himself so that he could not be found or induced to certify the verdict, and thereupon, in this dilemma, Henry Burnett, a justice of New Paltz attending said proceeding, certified the verdict in the form required by the statute. To this plea the defendants demurred; the demurrer was overruled at special term, and the defendants appealed to this court. The judge at special term entertaining great doubt on the question, on the ground that otherwise the relator would be without remedy, and that the certificate is a merely ministerial act. The argument *ab inconvenienti* is never of very great weight; of none against the positive injunctions of a statute. The law has said that the justice who initiated the proceedings shall consummate them, and I think the mandate must be obeyed. The contingency here presented must be of most unfrequent occurrence, and if any remedy is needed, it must be applied by the legislature. Nor can it be regarded as a very injudicious requisition, that the justice who has supervised the proceedings from beginning to end, and who has therefore personal knowledge of their regularity and correctness, or the contrary, should be the person whose certificate should be necessary to stamp them with authority. We should scarcely allow any justice other than the one who issued the summons in a civil action, and presided at the trial, to enter the judgment upon the verdict. The act in question is in some sense a *ministerial* act; not more so than that of the justice who enters the judgment upon the verdict of a jury, so far as the damages

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are concerned. He has no discretion in regard to them; he cannot alter them; and if he should *refuse* to enter the judgment, the proceeding must fall to the ground.

I am not forcibly impressed with the argument which seeks to gather the power for another justice to act in the contingency supposed, by the plea, from that provision of the statute which authorizes a special proceeding to be continued before another officer, in case of the death, sickness, resignation, removal from office, absence from the county, or other disability of the one before whom it was commenced. (3 R. S. 475, § 29, 5th ed.) Obviously none of these exigencies have occurred, unless it be that of *disability*. Disability implies want of power, not want of inclination. It refers to incapacity, and not to disinclination. It is founded upon a want of authority arising out of some circumstance or other, not withstanding the presence of any amount or degree of willingness or disposition to act.

The order of the circuit and special term was erroneous, and must be reversed with costs; and there must be judgment for the defendants on the demurrer, with leave to the plaintiffs to amend their plea on payment of costs.

[ALBANY GENERAL TERM, September 8, 1860. Gould, Hogeboom and Peckham, Justices.]

 CASTLE and wife vs. DURYEA.

32b 480
71 AD '443

What degree of care and caution are required from a military officer, while drilling his troops, in order to avoid the infliction of injuries upon individuals present as spectators.

And how far such officer is liable for an injury resulting from the negligence of himself or his subordinates, under such circumstances.

A defendant moving for a nonsuit is bound to bring to the notice of the judge the special grounds claimed as justifying it. A motion, general in its terms, will not present the objection that the action should have been *cess* for negligence, instead of *trespass* for a direct injury. Formal objections should not be listened to by the judge, on a motion for a nonsuit, unless distinctly made.

Castle v. Duryea.

IN the month of July, 1855, the 7th regiment of the N. Y. state militia, commanded by the defendant as colonel, was duly encamped, pursuant to official orders, near the village of Kingston, for several days. On the 13th day of the month, Mary Ann Castle, the plaintiff, visited the camp ground, and was sitting, with her infant child in her arms in front of the regiment, in the midst of some 2000 spectators, at a place selected by the guard or other members of the regiment for visitors. This was on the north side of the parade ground where most of the spectators were collected. In the course of their evolutions the regiment was faced to the north, directly towards these spectators, and distant from them some 350 feet. The defendant stood 80 paces in front of the center of the regiment. By his order the men during the military exercises brought their muskets to a horizontal position, and aimed in the direction of the crowd in front. From this position the defendant gave the order to *fire!* Whereupon the guns supposed to be loaded only with blank cartridges were discharged, and Mrs. Castle and the child in her arms were wounded by a musket ball; the former seriously and the latter fatally. The child was injured in the head, and died in 3 or 4 days afterwards. The ball struck the plaintiff, passing through her left breast and thence through her left arm, breaking the arm and shortening it and injuring it temporarily, and perhaps permanently, rendering it nearly helpless. She lingered in a critical condition for a long time, but after the 10th or 12th day she improved and ultimately recovered. It was about six weeks before she was moved from her bed. About the first of September she was able to be conveyed to New York, where she remained in care of a physician until the first of November, when she was returned to her husband, there being still some discharge from the wound.

The plaintiff brought this action of *trespass* for the injury thus occasioned to her, which was tried at the Ulster circuit, before Hon. D. WRIGHT, justice, on the 22d day of May, 1857. On the trial it was proved that the firing by the reg-

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iment, previous to the day of the accident, was to the east. The regiment was expected to fire blank cartridges; but on the morning of the occurrence the second company—the one fronting the plaintiff at the time she was wounded—had been engaged in target shooting, with ball cartridges, in a ravine adjacent to the parade ground: some of the guns were not discharged, though the caps exploded. Orders were given to have these guns taken to the rear, examined and unloaded—this examination was made, and the guns all supposed to be unloaded. There was also a general order that the commandants of each company should inspect the arms of his men thirty minutes before going into line, to see that they were not loaded. The company was then marched from the target exercise to the line then forming on the parade ground, and participated in the evolutions; and the firing shortly afterwards occurred.

The jury rendered a verdict in favor of the plaintiff for \$1500.

The court charged the jury, among other things, in substance that the defendant, as commanding officer of the regiment, had not only the right but was charged with the duty to exercise and drill his regiment at Kingston, and to establish his encampment there; that he was not responsible for the injury complained of, if he exercised the prudent care and diligence demanded by the circumstances; nor unless the jury were satisfied he had been guilty of negligence, a negligence not to be presumed, but to be proved by the plaintiff; that no action could be maintained against him for an act done by him in the execution of his office and within the scope of his authority, if done with all reasonable care and caution; nor was he responsible for the negligence of those under his command, unless he made himself a party to the negligence by giving an improper order, or by neglecting to give a proper order, or by neglecting some precaution which prudence required him to adopt.

The court further charged that this was not a case of mas-

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ter and servant, or principal and agent, and therefore the defendant was not responsible for an injury resulting from the negligence of his subordinates unless caused by some improper order given, or some proper order omitted, or by omitting some precaution which prudence required him to adopt. That the use of powder and fire arms, under all the attendant circumstances connected with this case, required the highest degree of care. To this charge the defendant's counsel excepted.

The court stated to the jury the several grounds upon which the plaintiffs claimed to have established such negligence as entitled them to recover, and upon which the defendant claimed to have established such freedom from negligence as defeated the plaintiff's right to recover. The court further charged the jury that the question submitted to them was whether the defendant in giving the order to fire was or was not under the circumstances guilty of negligence, or whether he omitted to give any order or take any precaution which prudence required. To this charge the defendant's counsel excepted. That if the jury found that the order to fire was, under the circumstances, an act of carelessness or negligence, or some order or precaution was omitted, which prudence required, and that the injury to Mrs. Castle was the result, then the plaintiffs were entitled to a reasonable compensation for the injury; and in deciding upon the amount of damages the jury were authorized to take into consideration the question whether the injury was likely to be permanent. To this charge the defendant's counsel excepted.

The court further charged that the degree of care and diligence required to avoid an injury was in proportion to the seriousness and magnitude of the consequences which would probably ensue from the want of them. That gunpowder and fire arms were powerful agents, and it was proper for the jury to consider whether the person using them, under the circumstances detailed in the evidence, was not bound to exercise a high degree of care and diligence to prevent injury.

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If such care and diligence were used, the defendant was not responsible, but he was responsible if the injury was caused by the order to fire, given by him, and that order was negligent and wrongful, or if the defendant had omitted any order or precaution which prudence required. To this charge the defendant's counsel excepted.

The defendant also made several requests to charge, with some of which the court refused to comply, and the defendant duly excepted. These are sufficiently noted in the opinion of the court. The defendant also, at the close of the plaintiff's evidence, moved for a nonsuit, which the court refused, and the defendant's counsel excepted. The exceptions were directed to be heard in the first instance at the general term.

C. Cooke, for the plaintiffs.

C. W. Sandford, for the defendant.

By the Court, HOGEBROOM, J. Inasmuch as no motion for a new trial has been made upon the judge's minutes, or at the special term upon the weight of evidence, or for excessive damages, but the case has been ordered to be heard in the first instance at the general term, we are restricted to the examination of *exceptions*. And of these none appear to have been taken to the admission or rejection of evidence. We must look, therefore, to the decision of the judge upon the motion for a nonsuit, and upon the charge and refusals to charge.

The defendant moved for a nonsuit on two grounds. 1. On the ground that there was no evidence to support the complaint, and none to go to the jury, upon which the defendant could be made liable. 2. On the ground that the defendant was acting as a public officer in the discharge of his duty, and was not liable, under the facts proved, for the injury sustained by the plaintiff. These grounds are stated in the

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most general form, and can scarcely be said to present any question for the decision of the court. It is not stated why or how there is no evidence to support the complaint; nor is attention invited to any particular aspect of the case, nor to the absence of evidence upon any particular point, nor upon any number of points combined, specifying what they were. I apprehend, under such circumstances, the judge is not called upon for a special exertion of his ingenuity or of his memory to see if he cannot devise some plausible objection to the plaintiff's recovery. The least that the defendant is called upon to do is to bring the special grounds, which justify a nonsuit, to his notice. I regard this rule as well settled by authority, and as highly reasonable upon principle.

Certainly such a motion does not present the question that the action should have been *case* for the defendant's negligence, instead of *trespass* for a direct injury. No objection whatever was taken to the form of the pleadings nor to the admissibility of evidence under them. If the objection had been taken, the pleadings would probably have been amended on the spot, had an amendment been deemed necessary. These formal objections must not be listened to, unless distinctly made.

Nor, if the motion were distinctly and specifically presented on the merits, ought the nonsuit, in my opinion, to have been granted. There was at least enough to go to the jury upon the question whether proper care had been taken in examining the muskets to see if they were unloaded; upon the question whether the defendant should have ordered the soldiers to fire in the direction of so large a body of spectators; or if so, whether the angle of elevation at which the guns were ordered to be fired, should not have been higher. There was therefore no legal error in refusing to nonsuit.

As to the *charge*, the substance of the legal propositions contained in it was, I think, as favorable to the defendant as the law would warrant. It held the defendant free from responsibility unless he had been guilty of negligence. It

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held him responsible for the acts of others only in the event that he had issued the order in conformity with which the act was done, or had failed to take proper precautions preparatory to the order, which, if such precautions were taken would or might be a proper and prudent order, but would be otherwise if those precautions were omitted. As to the existence of negligence, the judge seems to have fairly stated the positions taken and claimed by each party upon that point at the trial. The judge also charged that the degree of care and diligence requisite was in proportion to the seriousness and magnitude of the consequences, probable from an absence of it. This is one mode, and I think not an improper mode, of measuring the degree of care necessary to be observed. In another part of the charge, he observed that the use of powder and fire arms, under all the attendant circumstances connected with this case, required the highest degree of care. The attendant circumstances were the fatal consequences likely to ensue from carelessness in the use of loaded fire arms, and the presence of a large body of spectators near and in front of the troops, and there by the consent or acquiescence of the commanding officer. A very high degree of care—which is probably all that the judge intended by the term *highest* degree of care, when taken in connection with other portions of his charge—and especially that just previously quoted—was certainly requisite. It is scarcely worth while to enter into an argument to determine whether the highest possible degree of care was demanded. In regard to carriers of passengers, the courts have frequently said that the *highest* care and the *utmost* precautions are requisite, even with regard to stage coaches as well as vehicles propelled by steam, and a close and rigid comparison of the two cases might probably show that at least as much care would be necessary in the present case as in that of a carrier of passengers by stage coach, although the latter was under a contract for compensation for the transportation. But if the charge was, upon a strict scrutiny, objectionable in this

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particular, I regard the exception as unavailable by reason of its covering other matter not exceptionable, favorable to the defendant and which the defendant asked the court to charge—to wit, that it was not a case of master and servant, or principal and agent, and that the defendant was not responsible for the negligence of his subordinates, unless done in consequence of his improper order or unjustifiable negligence.

As to the *refusals* to charge: 1. Taken in connection with the facts of the case and with the residue of the charge, the judge properly refused to charge in an unqualified form the defendant's first request that an action cannot be maintained against a public officer for an act done by him in the execution of his office and within the scope of his general authority. The judge in substance charged that proposition elsewhere, with the qualification (a proper one) that proper care should be observed in the performance of the act. 2. The judge in substance complied with the defendant's third and fourth requests, to wit, that the proof must show neglect of duty on the part of the defendant himself which occasioned the accident, and that if the colonel took the usual precautions or gave the proper orders, he was not responsible for the carelessness or negligence of his inferior officers. The request was faulty in this: *usual* precautions, unless they were *prudent* or *requisite* precautions, would not absolve the defendant from responsibility. The judge charged right in this particular. 3. The sixth request—to wit, that the injury was not sustained by any act, order or intent of the defendant—was properly refused upon the ground that it was a question of fact proper to be submitted, upon the evidence, to the jury. 4. The seventh and eighth requests, so far as they declare it to have been the duty of the defendant to exercise his regiment in the use of their fire arms, with ammunition, and that in giving the order to fire (after proper precautions) the colonel only discharged a legal duty within the scope of his authority, were essentially and indeed expressly complied with by the judge. So far as the 8th request declares that the firing of the regi-

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ment in the *way and manner* they were firing at the time the casualty occurred was a necessary part of their duty, it presented a question of fact upon which the judge was not called upon to pass, but was properly submitted to the jury, or of mixed law and fact, on the law of which he properly instructed the jury in that portion of the charge elsewhere given. 5. The 9th request was correct in saying that the colonel, officers and men were (in the parade drill and general use of fire arms) engaged in the discharge of a common duty imposed upon them by the laws of the state. If it was intended to say that they were engaged in the lawful discharge of a duty in the particular case under consideration, it involved the whole subject of inquiry before the jury, and was properly refused. So far as it declared that if the defendant, in discharging his duties as colonel, gave the usual and proper orders to his subordinates, who either by accident or design did what they ought not to have done, in consequence of which the plaintiff was injured, then the defendant was not responsible, it was partly correct and partly incorrect, and might have been properly rejected for that reason. If by proper orders the defendant meant orders proper in themselves and given with proper precautions, the request was correct and was complied with. If the subordinates did what they ought not to have done, and not in execution of the defendant's proper orders, then the defendant was not responsible; and, thus qualified, it presented the precise proposition which the judge instructed the jury was the law of the case. 6. The 10th request, which was in part that this was not a case of master and servant, or principal and agent, was so far complied with by the judge. The residue, to wit, that as the colonel is placed in command of officers and men not selected by him, he is not responsible for their care and skill, as each has a duty peculiar to himself to discharge, is not unqualifiedly true. If the officer, knowing the incompetency of his subordinates, purposely assigns to them a task, in the execution of which it is reasonable to infer that negligence will

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occur and fatal consequences ensue, he is or may be responsible for the injuries thus occasioned. On this subject the judge seems to have taken so much of the proposition as was applicable to the facts of the case, and to have charged the law thereon correctly. 7. The 2d request—that negligence was not to be presumed but must be proved, and that the burden of proof was upon the plaintiff—was expressly complied with by the court. 8. The 5th request was refused by the court, and the defendant excepted. It was this; that if any negligence existed on the part of the defendant in exercising the regiment in firing blank cartridges, it was equally negligent in the plaintiffs to attend the parade, and they cannot sustain the action. This proposition involved a question of fact, and was properly refused. It was not necessarily negligence in the plaintiff to attend the parade. It may have been entirely proper, and does not appear to have been forbidden in any way by the defendant, nor any fault found with the place which the plaintiff occupied, at the time of the discharge of the fire arms which resulted in the injury. It was quite proper, therefore, for the court to decline absolutely to charge that the plaintiff could not sustain the action.

I have thus reviewed at length all the legal propositions taken by the defendant upon the trial, and am not able to see that any substantial error was committed by the judge in disposing of them, and I am therefore of opinion that a new trial should be denied.

Judgment accordingly.

[ALBANY GENERAL TERM, September 8, 1860. *Gould, Hogeboom and Peckham, Justices.*]

DOWS, survivor, &c. *vs.* GREENE and MATHER.

A bill of lading need not be signed by the master of the vessel. It is sufficient if it be signed by the consignor of the goods, who is also owner of the vessel. What will amount to proof of an implied authority in a clerk in a mercantile house to sign shipping bills in the names of his principals.

Where consignees make advances upon a bill of lading, to the holder, in good faith, relying upon the same as evidence of the holder's ownership, and without notice of any facts justifying the conclusion that he was not the real owner, or that any fraud was meditated, or had been committed in the purchase of the property, they will be deemed *bona fide* purchasers, and entitled to hold the property, to the extent of their advances, as against the consignors or subsequent purchasers from the latter.

Under such circumstances, the consignors will, as in other cases of a *bona fide* change of ownership, lose their right of stoppage *in transitu*, notwithstanding the purchase of the property from them may have been fraudulent. And the right of the consignees being protected by the 1st and 2d sections of the factor's act, (3 *R. S.* 76, 5th *ed.*) they may, after demand and refusal to deliver the property to them, maintain replevin against the person in possession, to recover the property, or its value.

THIS was an action to recover a quantity of corn. On the former trial of this cause the defendants had a verdict. A new trial was granted by the supreme court in the third district, (*see* 16 *Barb.* 72.) The cause was tried the second time before Hon. WM. B. WRIGHT, without a jury, and resulted in a judgment in favor of the plaintiffs. The plaintiffs, Dows & Cary, were commission merchants, doing business at New York, and claimed title to the corn as *bona fide* purchasers or lien holders thereof for value from Mack, as an alleged purchaser thereof from Niles & Wheeler, and also as consignees of the corn shipped by Mack on the boat of Niles & Wheeler, and holders or indorsers of the bill of lading therefor. The defendants claimed title to the corn as *bona fide* purchasers thereof from parties who had obtained title from Niles & Wheeler, after the latter had repudiated the sale to Mack as unauthorized by them, and also as fraudulent. Niles & Wheeler were forwarders, at Buffalo, and agents of the American Transportation Line of Canal Boats, which line was owned by them and M. M. Caleb, of New York, who

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was their partner in the forwarding business. Niles & Wheeler also purchased and sent corn to market, on their own account. The plaintiffs claimed the corn under certain bills of lading executed at Buffalo, dated August 7th, 1848, by Niles & Wheeler per E. H. Walker, their clerk and agent, showing the shipment of the corn to account J. F. Mack, care of plaintiff, New York. The form of the several instruments herein called bills of lading, is given in the case, and one of them, that on which the plaintiff relies to recover, is as follows: "No. 143, duplicate. Buffalo, August 7, 1848. Shipped in good order by Niles & Wheeler, agents, on board canal boat Neptune, — master, American Transportation Company's Line, the following named articles, made and consigned as in the margin, to be delivered as addressed without delay. Account J. F. Mack, care of Dows & Cary, N. Y. 2385 bushels corn, Ohio freight to New York, per bushel 13 cts. Niles & Wheeler per E. H. Walker." By a subsequent bill of lading the quantity was corrected, and stated at 2565 bushels of corn.

Mack resided at Rochester, and was a dealer in grain. James L. Bloss resided at Rochester, and had for several years been purchasing grain in his own name, but in fact as the agent for other persons and by their direction. He had for five or six months previous to the transaction in question, been making such purchases as the agent of Mack, and had received the money promptly in each instance. In transactions of this kind, he had asked for duplicate bills of lading, and the vendors had given the bills before the delivery of the property and before receiving payment. They had trusted to his honor and the integrity of the man at Rochester to send the money, and it had always come. Niles & Wheeler had purchased a cargo of about 10,000 bushels of corn, which was on board the propeller Montezuma, lying near their warehouse at Buffalo. On Monday the 7th of August, 1848, Bloss called at the office of Niles & Wheeler and proposed to purchase the corn, intending it for Mack, but did not

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mention the fact that he was acting as an agent. The negotiation was between Bloss and Niles, the price asked was forty-four cents per bushel, and Bloss said he would take the corn if he could have a little time to get money from Rochester, and gave a reference for certainty of payment. Niles said he wanted no reference, as they would only sell the corn for cash. Bloss thereupon left the office but was immediately called back by the order of Niles. When the negotiation proceeded, Niles asked where Bloss wished to transport the corn, and on being answered, to New York, he said they could perhaps make arrangements if he (Niles) could transport the corn. It was finally agreed that the money should be paid half on Friday and the remaining half on Saturday, and that Niles & Wheeler should transport the corn to New York on their boats, at thirteen cents per bushel. Niles said he would not sell on credit to any body; that he would hold the corn on his boats until it was paid for, and such was the arrangement between them. Bloss said Niles would be indemnified by the property itself, as he (Bloss) would not get possession of it until it was paid for. Bloss immediately telegraphed to Mack advising him of the purchase of the corn, mentioning quantity and price, and on the evening of the same day Bloss received the bill of lading before referred to, executed in the name of Niles & Wheeler, by Walker their clerk. He had before made out some bills of lading, and evidence was given tending to show his authority, and also that Niles was present when he made out the bills of lading. The defendant gave evidence tending to show that Walker had never signed such bills of lading before, but only bills where the goods shipped belonged to other persons and not to Niles & Wheeler. Walker made a distinction between receipts for property and memoranda of shipment, (such as he claimed these to be,) and regular bills of lading. The corn was shipped on the boats Cuba, Neptune, P. B. Langford and A. Beardsley. The loading was commenced, according to Bloss, on the same day, (Monday, 7th August,) and as

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Bloss thinks, was completed as to two boats, (Cuba and Neptune,) the same day. Van Inwegan, the tally clerk, says the loading of the Neptune was commenced on Monday, and completed on Tuesday or Wednesday, and the Cuba started first on the 9th, (Wednesday,) and the Neptune on the 10th, (Thursday.) The evidence left the time of lading in some doubt. On Monday, the day of the purchase, Bloss got the tally of the cargo of the two boats, (Cuba and Neptune,) and delivered them at the office of Niles & Wheeler about six or seven o'clock in the evening, and received from Walker, their clerk, bills of lading of the two boats. Bloss sent the bills of lading to Mack the same day, informing him that the corn was to be paid for on Friday or Saturday. The plaintiffs had been at Rochester on the 5th or 6th of August, and had agreed with Mack to make advances to him on corn, to thirty-eight cents per bushel, on his furnishing shipping bills for the corn. The business was to be done on the part of the plaintiffs by James Chappel, their general agent at Rochester. Mack was to furnish the shipping bills to Chappel, who was to indorse Mack's drafts on the plaintiffs, for the amount of the advances, which the plaintiffs were to accept and pay. Advances to Mack in the same way had been made before. On Tuesday, the 8th of August, Mack presented to Chappel the two bills of lading, (Cuba and Neptune,) and drew two bills on the plaintiffs, one for \$1000 at thirty days, and one for \$800 at twenty-five days, both payable to the order of Chappel, and both indorsed by him, on receiving the bills of lading, and the drafts were delivered to Mack. Mack passed and negotiated the drafts to the Rochester City Bank, and received the money therefor. On the same day Chappel enclosed the shipping bills to the plaintiffs in New York. The two drafts were presented for acceptance by the American Exchange Bank, and accepted by the plaintiffs on the 10th of August, (Thursday,) and were paid at maturity. On Friday the 11th of August, Bloss sought Niles and told him that he had sent shipping bills of the corn to Roch-

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ester to Mack, for whom he had bought the corn, that he had not received the money and did not know what the matter was, that he had never been disappointed in receiving money, but had previously received it promptly in every instance. Niles said this was the first he had heard of Mack or of shipping bills, and he should sell the corn. Bloss asked him to wait till he could telegraph Mack and get an answer, and Bloss did telegraph him several times without getting any answer. He then proposed that Niles or his clerk should go with him to Rochester, saying he would pay the expenses and get the money or give up the corn. Niles said Van Inwegan (his clerk) might go, and he went that day with Bloss to Rochester, where Bloss found that Mack had failed and left town on Thursday. On that day, the 10th of August, Mack made a general assignment of all his property to John Brown, preferring him to the amount of about \$10,000, and distributing the residue of his property equally among the rest of his creditors, among whom Niles & Wheeler were named as creditors for corn sold, to the amount of about \$4,400. On Saturday Van Inwegan telegraphed Niles that the corn was not paid for, and Mack had run away. Niles then sold the corn to P. Durfee & Co., at Buffalo. Durfee & Co. consigned the corn and delivered the bills of lading to Arthur H. Root. Root transferred them to Joseph H. Green, jun. the latter to Green & Mather, and they to L. W. Brainard, and under these parties the defendants claimed to hold the property, and on demand made refused to deliver it to the plaintiffs. On Saturday afternoon Niles went to Rochester; went up the canal on Sunday, and met three of the four boats and gave them new bills of lading on account of P. Durfee & Co., care of Arthur H. Root, Albany. The Cuba had passed Rochester before he got there. He sent a bill after her, to be signed, which seems to have been done. The boats had all left Buffalo with bills of lading to M. M. Caleb & Co., New York. On Friday, the 11th of August, when

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Niles was informed of the bills of lading to the plaintiffs he telegraphed them as follows :

“Ten thousand and ninety bushels of corn shipped by us on boats Cuba, Neptune, A. Beardsley, P. B. Langford, acc’t J. F. Mack, to Dows & Cary, is not paid for. We notify you to consider and hold the same to our account till further notice.

NILES & WHEELER.”

There was a mistake in the amount of the corn as stated in the first bills, and this was corrected on Wednesday. When the Neptune arrived at Albany the plaintiffs demanded the corn of the defendants, and offered to pay the freight, the defendants then having possession thereof; but they refused to deliver it, and denied the plaintiffs’ right to the corn.

The same testimony given on the former trial was read by consent, on the second trial. The plaintiffs proved by Bloss, in addition, that the bills of lading were made out by Walker, he having been referred to by some apparently responsible man in the office as the proper man for that purpose, and that, as he thinks, Niles was present in the office when he made out the bills of lading, and that subsequently when the fact was again talked over, Niles made no objection on the ground of want of authority. The bills of lading were in the hands of Bloss, at Buffalo, on the 9th of August. Cary, one of the plaintiffs, saw them there, and having looked at them handed them back to Bloss, who then mailed them to Mack at Rochester, who delivered them to Chappel’s clerk, receiving from him therefor two drafts of Mack on the plaintiffs, payable to the order of and indorsed by Chappel, one for \$1000, and one for \$800, which Mack procured to be discounted at the Rochester Bank. The bills of lading were immediately sent by Chappel’s clerk to New York, where they were accepted by the plaintiffs on the 10th of August, and subsequently paid by them at maturity some 25 or 30 days thereafter.

The parties then rested, and the defendants’ counsel renewed the motion for a nonsuit which had been before made

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at the close of the plaintiff's testimony, upon the following grounds: *First.* That the plaintiffs should show that Walker was authorized to make and execute the contract for the sale of this corn. *Second.* That Chappel was bound to inquire as to the extent of Walker's powers, and is chargeable with knowledge that he had not any proof of any agency to execute a bill of lading, and no proof of any power to make a contract. *Third.* There was no proof of authority to Walker to sign and execute bills of lading for Niles & Wheeler. The judge on each occasion overruled and denied the motion for a nonsuit, to which decision and ruling the defendants on each occasion excepted. And thereupon the said justice made his statement of facts found by him, and his conclusions of law, in the premises, as follows, to wit:

"*First.* I find that Niles & Wheeler, from whom both parties claim title to the 2565 bushels of corn in question in this action, were partners, dealing in produce, at Buffalo, N. Y., during the year 1848, and that they were also engaged in the business of transportation upon the Erie Canal, with one M. M. Caleb, at the same time, under the style of 'American Transportation Company,' Niles & Wheeler at Buffalo, and said Caleb having his office for the company in the city of New York; between which cities the said transportation business was carried on; and that on and before Monday, the 7th day of August, 1848, the said Niles & Wheeler, as produce merchants, were the owners of the said corn. *Second.* I find that on the 7th day of August, 1848, the said corn was in the lake boat called the Montezuma, of said Niles & Wheeler, at Buffalo, and that on said day one James O. Bloss came into their office and commenced a negotiation with said Niles, for the purchase of the said corn, which resulted in a verbal agreement for the purchase of said corn, at 44 cents per bushel, for cash, to be paid half on Friday and half on Saturday, the 11th and 12th days of August, 1848; that said Niles & Wheeler were to ship the corn, for Bloss, on the boat of the American Transportation Company, (of which

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company they were members, and acted at agents,) for New York, and to transport the same there for the sum of 13 cents per bushel, to be paid by said Bloss; that said contract was *made by said Bloss, as the agent* of and for one J. F. Mack, and he acted throughout as such agent, *though he did not disclose the fact* to Niles & Wheeler that he was acting as agent for Mack until after the agreement had been made, and subsequently to obtaining the bill of lading, as hereinafter stated. Under this agreement, the corn in question in this case was shipped and transferred from the lake boat Montezuma to the canal boat Neptune, on the 7th August, 1848. That on the 7th day of August, Bloss obtained from one Walker, a clerk in the office of Niles & Wheeler, a bill of lading for said corn, which bill stated that the said corn had been shipped in good order by Niles & Wheeler, agents, on board the canal boat Neptune, marked and consigned as in the margin, to be delivered as addressed without delay. In the margin was as follows:

"Account" J. F. Mack, Care of Dows & Cary, N. Y.	}	Freight to New York, a bushel, 13 cents. (Signed,) <div style="text-align: right;"> NILES & WHEELER, <i>per E. H. Walker.</i> </div>
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That Bloss obtained said bill of lading in good faith, and Walker had authority to execute it for Niles & Wheeler, and it was in fact so executed by Walker, with the knowledge and sanction of one of the firm of Niles & Wheeler; that said shipping bill was by said Bloss transmitted to J. F. Mack at Rochester, and said Mack obtained from the plaintiffs, through their agent, an advance thereon, upon the faith thereof, on the 8th August, 1848, of 38 cents per bushel; said advance was made by indorsing the drafts of Mack, drawn at Rochester on the plaintiffs at New York, and dated 8th August, 1848, and accepted by the plaintiffs on the 10th August, 1848, and paid by them at maturity; said drafts were indorsed by the agent of the plaintiffs at Rochester, on

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the 8th August. And the same were negotiated and discounted, and the money obtained thereon on the same day by Mack, at Rochester. Such advance was made by the plaintiffs in good faith upon said bill of lading, without any notice or knowledge of any kind to them or their agent, or any fraud having been committed or intended by any one in the purchase of the said corn or in obtaining the said bill of lading. I further find that said Bloss gave notice to Niles & Wheeler on Friday the 10th day of August, 1848, that he had not received the money from Rochester to pay for said corn as he had expected, and for that reason could not complete the purchase of it; and then first informed them that he was acting as the agent of Mack in the purchase of the corn, and not on his own account. Bloss proposed to Niles & Wheeler, that if they would send a man with him to Rochester, if he did not get the money he would give up the corn. Van Inwegen, who was in the employ of Niles & Wheeler, went to Rochester; upon reaching Rochester, Bloss found that Mack had failed and absconded. Mack, the day previously, on the 10th August, 1848, had made a general assignment of his property, a copy of which was given in evidence, and is set forth in the preceding case. I further find that on the 12th August, 1848, Niles & Wheeler assumed to sell the corn to P. Durfee & Co., at Buffalo, and delivered to them other bills of lading thereof; that said canal boat Neptune was on her way to New York, under the bill of lading to Mack with said corn, and had got as far as Rochester, when she was overtaken by Niles on the 13th August, and her papers changed as to the bill of lading; that on the 14th August, 1848, a duplicate bill of lading of the corn on the Neptune was delivered, signed by Niles & Wheeler to Durfee & Co. Niles & Wheeler also executed a bill of sale of the corn to them. Durfee & Co. paid Niles & Wheeler for the corn by drafts on A. H. Root, which were accepted by Root, and subsequently paid. That Durfee & Co. caused the corn to be delivered to the defendants herein.

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I further find that said canal boat Neptune had 2565 bushels of corn on board of her on the 8th August, 1848, and when she left Buffalo, and the said bill of lading issued on the 7th August to Bloss was corrected in the amount of corn on board, by another issued in the same form and manner and by Walker, under the same authority, on the 8th August, 1848, stating the amount of 2565 bushels as the quantity on board the Neptune, which corrected bill was sent to Rochester, and was there on the 10th August, on which day a further advance was made thereon in like manner as that made on the 8th August, so as to make up the amount of 38 cents a bushel on the whole cargo of 2565 bushels. That afterwards, and after the boat Neptune had arrived at Albany, on her way to New York with said corn, and on or about the 22d August, 1848, the defendants took possession of her and claimed to hold said corn on behalf of said Durfee & Co. and denied the right or title of said plaintiffs to said corn, or any part thereof. The plaintiffs then demanded the corn and the delivery thereof, offering to pay to the defendants the freight of 13 cents per bushel thereon. The defendants refused to deliver the said corn to the plaintiffs, and denied their right to the same, or their having any interest therein. The corn was worth at the time it was replevied, viz: the 22d August, 1848, fifty-five cents per bushel, making the whole value \$1410.75. The interest on that sum to 27th September, 1858, is \$997.67."

And he decided as matter of law upon the preceding statement of facts, 1st. That the plaintiffs were consignees of said corn under and by virtue of the facts stated, and obtained a lien upon said corn under the factor's act for the sum advanced upon the faith of the said bill of lading, viz: thirty-eight cents per bushel, upon the amount of said load of corn on the canal boat Neptune. To which ruling and decision the defendants' counsel excepted. 2d. That the plaintiffs, as bona fide purchasers for value to the extent of their advances, were entitled at common law, as well as under the

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statute, to the possession of the corn, before and at the commencement of this suit. To which ruling and decision, either that the plaintiffs under the facts proved were bona fide purchasers of the corn to the extent of their advances, or that they were entitled at common law or under the statute to the possession of the corn at the commencement of the suit, or at any time before, the defendants' counsel excepted. 3d. That the plaintiff as survivor of Ira B. Cary was entitled to judgment for the recovery of the possession of the corn, and his damages for the retention thereof; or in case delivery could not be had, that he recover for the value thereof the sum of \$1410.75, besides the said damages of \$997.61 for detention. To which ruling and decision that the plaintiff was entitled to recover the possession of the corn, or damages for its detention, or that he was entitled to recover at all in the action, the defendants' counsel excepted. And the defendants excepted severally, 1. To each of the findings of fact in the preceding statement of facts, as against evidence. 2. And they also excepted severally to each finding as a conclusion of law in the preceding statement. 3. And they separately excepted that the said justice should have found upon the evidence that the said plaintiffs were not bona fide holders of said bill of lading obtained by Bloss on the 7th August, 1848, but that the same contained on its face sufficient to put Chappel and the plaintiffs upon inquiry as to its validity. 4. And they excepted separately, that the concealment of agency by Bloss for Mack from Niles & Wheeler, was a fraud in law, which vitiated the bill of lading. 5. And they excepted separately, that the contract for refusal is fraudulent within the statute of frauds. 6. And they excepted separately, that as Cary was informed of the bargain of Bloss on or before the 9th August, 1848, his firm must be presumed to know the condition of the sale as to payment, and they accepted the drafts with notice of the condition, and were not bona fide holders of the bills obtained from Walker. 7. And they excepted separately, that the concealment of the

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insolvency of Mack from Niles & Wheeler, was a fraud in law, which vitiated the whole contract for sale, and the bill of lading founded upon it. 8. And they excepted separately, that the assignment of Mack on the 10th August for his creditors, was conclusive evidence of his intent to defraud Niles & Wheeler in the purchase of the corn made on the 7th August. 9. And they also excepted separately to each ruling in the decision of matters of law in the aforesaid statement.

Upon this finding of the judge, judgment was entered for the plaintiffs, in accordance therewith, on the 29th day of November, 1859, and the defendants appealed therefrom to the general term.

L. Tremain, for the plaintiffs.

W. D. White, for the defendants.

By the Court, HOGESBOM, J. The action in this case is replevin, to recover 2565 bushels of corn alleged to have been unlawfully detained by the defendants from the plaintiffs. Both parties claim title to the corn, and through the same persons, Niles & Wheeler, who were at one time confessedly the owners thereof. The plaintiff's title, if otherwise valid, is prior in point of time to that of the defendants, and in such case must prevail. The question is upon the validity of the plaintiff's title; which is always the question in an action of replevin, and especially so in this case, as the defendants' title is in no way impeached, if the plaintiffs' title fails. The plaintiffs make title as alleged bona fide holders of the bill of lading, relying upon which as the evidence of title to the property, they made advances to the shipper of the goods, and they claim a lien to the extent of these advances as against the defendants, (who are subsequent purchasers of the corn from Niles & Wheeler,) both at common law and under the statute "relative to principals and factors and agents," (3 R. S. 76, §§ 1, 2.) The important inquiries,

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therefore, to which we should direct our attention, are 1. Is the instrument, under which the plaintiffs claim, a bill of lading? 2. Was it executed and delivered to them by the owners of the goods or their agent; or did the plaintiffs come into possession of it in some other way, in a manner to bind the owners, Niles & Wheeler? 3. Did the plaintiffs make advances thereon in good faith before notice that the person in whose name the shipment of the goods was made was not the actual and bona fide owner thereof? Let us examine each of these propositions.

1. The instrument under which the plaintiffs claim was a bill of lading. If not exactly formal, it was substantially such. It did not detract from its force or validity that it purported to be the act of the *owners* of the *goods* and also of the *carrying vessel*, instead of their agent, the master or captain. Not only from its similarity to other bills of lading has this been argued to possess the character of such a paper, but this *very* instrument has in several instances been *adjudged* to be a bill of lading. That question, therefore, is no longer open to discussion. (*Dows v. Perrin*, 16 *N. Y. R.* 328, 9. *Dows v. Greene*, 16 *Barb.* 72. *Dows v. Rush*, 28 *id.* 183. *Bank of Rochester v. Jones*, 4 *Comst.* 497.)

2. The paper does not purport to have been executed by Niles & Wheeler personally, but by them "per E. H. Walker." We must therefore inquire into the authority of Walker to execute and deliver the instrument. He had no *express* authority. He was not instructed by his principals to execute the paper. But there is much evidence of *implied* authority. He was a clerk in the employ of Niles & Wheeler, the only indoor clerk at that time. He was a clerk in the shipping or carrying business; a clerk to *make out* bills of lading; a clerk to sign those of a particular character, to wit, where Niles & Wheeler were mere freighters and not owners of the goods. He does not recollect before to have signed any, where Niles & Wheeler were the owners; but this nice distinction, it seems to me, cannot affect his real authority, or prejudice the

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public or dealers with the concern, ignorant of any such limitation. It is somewhat remarkable that Niles, who was examined as a witness in the cause by the defendants, (Wheeler not being at home at the time of the transaction,) does not deny the authority of Walker to sign bills of lading, and is not examined upon that subject. On the first trial of the cause Bloss testified that he did not recollect that Niles was present when the bills of lading were obtained, or then knew of the fact; and Niles swore he did not. But on the second trial, now under review, Bloss testified that when he first inquired at the office for the bill of lading, some person within the bar or enclosure, and some person with whom he had conversed as to the purchase of the corn, referred him to Walker; and among the persons thus within the bar, was, he *thinks*, Mr Niles; that it was in pursuance of this reference that he got the bills of lading of Walker; and that when, after the bills were procured, he in a subsequent part of the week, spoke to Niles about having sent the bills of lading to Rochester, the latter did not, to his recollection, object to or deny Walker's authority to sign the bills. Upon this evidence the judge who tried this cause at the circuit without a jury, found "that Bloss obtained said bill of lading in good faith, and Walker had authority to execute it for Niles & Wheeler, and it was in fact executed by Walker with the knowledge and sanction of one of the firm of Niles & Wheeler." On this evidence I think we cannot, in a court of review, subvert this finding, or undertake to say it was a finding against the weight of evidence. There may be some little further evidence on this point, which has escaped my attention, but none, I think, of much moment, and I cannot therefore regard it as an appropriate case for granting a new trial on account of an erroneous finding on this question of fact.

Assuming the bill of lading to have been well executed by Walker in behalf of Niles & Wheeler, and to have gone into the possession of Bloss lawfully, did the plaintiffs make advances upon it to Mack in good faith, relying upon the bill of

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lading as evidence of his ownership and without notice of any facts justifying the conclusion that he was not the real owner, or that any fraud was meditated, or had been committed, in the purchase of the corn? This question has been answered in the affirmative by the judge who tried the cause, and I think upon sufficient evidence. There is some testimony tending to show that Bloss saw Cary on the 9th of August, at Buffalo, but none that he disclosed to him there the particulars of the contract; and some testimony tending to show that Dows went down the Hudson river with Mack after he made the assignment, but I can discover none seriously affecting or at any rate overthrowing the other facts in the case tending to show that the advances were made by the plaintiffs in ignorance of any circumstances tending to cast suspicion upon the title of Mack. A new trial upon that ground ought not therefore to be granted.

It remains to consider another question of some importance, made so by the decision of the court of appeals in the case of *Dows v. Perrin*, (16 N. Y. Rep. 325,) to wit, whether, assuming the bill of lading to have been executed under proper authority and to have been lawfully and intentionally delivered to Bloss, and to his principal Mack, and the plaintiffs as the indorsees of the bill of lading and the consignees of the goods to have made advances thereon to Mack in good faith without notice that he was not the owner of the goods, the plaintiffs' title to the corn is good, notwithstanding Mack may have intended a fraud in acquiring possession of the goods and purchased with a preconceived intention not to pay. For the purpose of considering this question, I assume that the intentions of Mack, though not of Bloss, were fraudulent, there being sufficient evidence in the case, perhaps, to justify such an inference, although the judge has not found the fact, and there is room for debate whether the fraudulent intent on the part of Mack was conceived until after Bloss had sent on to him the bills of lading from Buffalo. The court of appeals, in the case last cited, are reported to have decided that a bill

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of lading is only so far negotiable as to protect a bona fide indorsee thereof for value from the exercise by the consignor of the right of stoppage *in transitu*; but when such bill of lading is obtained by fraud, from the owners of the goods, and there has been in fact no sale of them, an indorsee, though taking in good faith and for value, can obtain no better title to the goods than the indorsee had. The bill is of no effect, except when the assignor has at the time some right or authority operative as against the owner until rescinded by him. (*Dows v. Perrin*, 16 N. Y. Rep. 325.)

Now the first remark to be made in reference to that decision is, that the case called for no such adjudication. The court, before announcing the principle just quoted, had decided that the judge at the trial should have nonsuited the plaintiff for want of evidence of authority on the part of Walker to execute the bill of lading, and then proceeded to declare this principle in anticipation of the state of facts which might be presented upon a new trial. While the principle thus announced is, therefore, entitled to the greatest respect as the opinion of the highest judicial tribunal in the state, it does not possess the force of authority, as a rule of action in other cases.

Nor is it necessary to dispute the position maintained by the learned chief justice who delivered the opinion of the court, that Mack, as the fraudulent purchaser of the goods, was not in a situation to dispute the title of Niles & Wheeler or that of their bona fide assignees. He acquired no title by the purchase, on account of the fraud, and was liable to an action of replevin for the goods.

But the important question is, what right did the bona fide purchaser from him acquire; for such is the situation of the plaintiffs. I take it to be very well settled that a bona fide purchaser for value from a fraudulent vendee obtains a superior title to a subsequent bona fide purchaser from the vendor, where possession accompanies the sale from the fraudulent vendee. And in this case I think Mack must be deemed

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to have had the possession. In the first place, Bloss, and through him, his principal, Mack, obtained lawful possession of the corn. The bill of lading was made out in the name of Mack; the goods mentioned in the bill of lading were deposited in the canal boat, and by virtue of the bill, and with the consent of Niles & Wheeler, the master of the boat held the goods as the goods of Mack; at least as the goods of Mack or of his consignees, the plaintiffs. He held them in no sense as the goods of Niles & Wheeler. In fact he held them as the property and for the benefit of the consignees, the plaintiffs. Prima facie the right of property, as between the consignor and consignee, is in the latter; though the transaction is subject to explanation, and the consignee may be shown to be the mere agent or depository of the consignor. This being so, the goods on board of the canal boat were, with the knowledge and consent of Niles & Wheeler expressed on the face of the bill of lading, in fact held by the master of the boat for the plaintiffs as the owners thereof. Is it possible, under such circumstances and in the absence of fraud, that Niles & Wheeler could subsequently convey a valid title to the defendants?

Properly speaking, therefore, the question discussed in the case of *Dows v. Perrin* did not arise. The plaintiffs were not the *indorsees* of the bill of lading, but the *original* parties thereto, the very persons in whose favor the bill was made; and it seems unnecessary to discuss the question whether a subsequent indorsee receiving the transfer of the bill simply by indorsement or assignment from a fraudulent shipper or consignee of the goods, as a security for cash advances made in good faith, acquires a title untainted with the original fraud. In one sense, indeed, the plaintiffs may be said to be subsequent parties; that is, they are not the original purchasers from Niles & Wheeler, but purchasers from their fraudulent vendee. And although this assimilates them, somewhat, to mere indorsees in good faith of the bill of lading, yet I think the fact that the plaintiffs are the actual consignees of the corn —

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named as such in the bill of lading—creates a material distinction in their favor.

But let it be conceded that the plaintiffs occupy the position simply of bona fide indorsees of the bill of lading, making advances in good faith upon the strength of Mack's supposed ownership of the goods, is it true that the law is, and "that the courts have gone no farther upon this subject than to hold, that the bona fide indorsee of a bill of lading for value is not liable to have the property which it represents stopped *in transitu* by his consignor on account of the non-payment of the purchase price," and "that the holder of such a bill void [voidable?] on account of fraud, cannot confer a better title than he had himself"? (16 *N. Y. Rep.* 332.) By the use of the term *void*, I presume is here meant *voidable*; for in the connection here used, a bill of lading is never absolutely void, but only voidable at the instance of the aggrieved party, and in that sense it is every day's experience that a fraudulent vendee can confer upon a bona fide purchaser a better title than he himself had. And for the purpose of this argument, a bona fide indorsee of the bill of lading for value stands in all substantial respects in the attitude of a purchaser of the goods. The bill of lading is the symbol of title, and the evidence of possession. It is the *key* of the canal boat *warehouse*. The master of the boat holds the goods for, and as being in the possession of, the party named as *owner* in the bill of lading. The party then has all the possession of which the nature of the thing is capable, while in the act of transportation by another party for his benefit. And the advance upon the credit of the goods, whether to the full or only the partial value, makes him *pro tanto* the *purchaser* of the goods—the *conditional* purchaser—the purchaser until the amount of the advances is reimbursed, or what is the same thing, the lien-holder or mortgagee. The *indorsement* of the bill of lading is the bill of sale of the goods. By commercial usage it has this effect, in the same manner and to the same extent as if the bill of sale or transfer of title was written out

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at length upon the back of the bill of lading. To this extent the negotiability of these instruments has never, so far as I know, been questioned. The plaintiffs, therefore, as bona fide indorsees for value of the bill of lading, stand in precisely the same light as any other bona fide purchasers of property from a fraudulent vendee. The vendors in this as in other cases of a bona fide change of ownership, lost their right of stoppage *in transitu*, and not the less so, though the purchase from them was fraudulent. Strictly and technically speaking, perhaps the right of stoppage *in transitu* in most cases applies to a case where the purchase may have been fair, but the purchaser is, or becomes, insolvent; but was it ever doubted that it could also, and more emphatically, be exercised where the purchase was fraudulent, and the lawfulness of the exercise of this right in each case depends, when exerted against another party than the original purchaser, upon the question has such party obtained the transfer of title in good faith, for value and upon the presumed ownership of the goods in his vendor? If so, the right of stoppage *in transitu* is at an end. Under the facts proved and found, therefore, the plaintiffs are bona fide holders for value of the bill of lading and of the corn, under a bill of lading lawfully executed and delivered to their vendor by the original owners of the goods and of the shipping boat, with nothing to impeach their title except the fraud of their vendor, of which they were ignorant. I think this gives them a good title as against a subsequent purchaser from the original owners.

3. Assuming the facts of the case to be such as have been before mentioned and such as have been found by the trial court, I am of opinion that the right of the plaintiffs to recover stands firm upon the 1st and 2d sections of the factor's act. (3 R. S. 76, 5th ed.) That act in substance provides that every consignee of merchandise shall be entitled to a lien thereon for any money advanced or negotiable security given by such consignee to or for the use of the person in whose name the shipment thereof shall be made, and that such last

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named person shall be deemed the true owner of such merchandise, unless the consignee shall have notice to the contrary by the bill of lading or otherwise. The case of the plaintiffs, as established by the evidence and found by the court below, seems to stand precisely in the predicament contemplated by this act. The plaintiffs being therefore protected by this act, having the constructive and the actual possession of the goods under the bill of lading—being deprived of that possession by Niles & Wheeler—finding their property subsequently in possession of the defendants, who upon demand refused to deliver the same to them, were entitled, I think, to maintain the action of replevin and to recover the corn or its value. The view of the case taken by the court below was correct, and the judgment of the circuit court should be affirmed.

[ALBANY GENERAL TERM, September 8, 1880. *Gould, Hogeboom and Boetes*, Justices.]

THE PEOPLE, *ex rel.* The Bank of the Commonwealth, *vs.*
THE COMMISSIONERS OF ASSESSMENTS AND TAXES OF THE
CITY AND COUNTY OF NEW YORK.

The statutes of this state clearly require that every moneyed or stock corporation shall be assessed for, and pay taxes upon, the whole amount of the balance of its capital stock paid in and remaining, after deducting the shares of stock excepted or exempted by the 10th section of the statute, (1 R. S. p. 994, 5th ed.) notwithstanding a portion or even the whole of such balance may be invested in stocks of the United States held by such corporation.

Those statutes, thus construed, are not unconstitutional in so far as they provide for, or authorize, taxation by state authority of any part of the capital stock of a moneyed corporation which is invested in stocks of the United States.

This construction is not an evasion of the admitted rule of law that United States stocks are not liable to taxation by state authority; the assessment being, not in form merely, but in fact and in principle, upon the *capital stock* of the corporation, and not upon the property in which the money paid in for that capital is invested.

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THE Bank of the Commonwealth, the relator in this case, is a banking association in the city of New York, formed under the act to authorize the business of banking, passed April 18th, 1838. Its capital stock actually paid in amounts to \$750,000, of which the sum of \$188,834.84 is invested in real estate occupied as a banking house, &c. which sum being deducted from said capital leaves a balance of \$561,165.16: Of this balance the sum of \$103,000 has been invested by the bank in United States stocks of the loan of 1858, which stocks and the certificates therefor it now owns and holds, and the bank claims that said stocks, and the amount of the capital of the bank invested therein, are, under the constitution of the United States, exempt from taxation. The commissioners of taxes and assessments of the city and county of New York denied the application of the bank to have said sum of \$103,000, so invested in United State stocks deducted from the amount of its capital liable to taxation for the year 1859, as personal property, and decided that such sum was not exempt, as claimed, and they assessed the capital stock of the bank liable to taxation as personal property, for the year 1859, at said sum of \$561,165.16.

On the relation of the bank a writ of certiorari was issued to the commissioners, who made return thereto, showing the facts above stated; upon which this court, at special term, in July 1859, decided and adjudged that said assessment should be confirmed, with costs against the relator. The following opinion was given by the justice deciding the cause, at the special term:

SUTHERLAND, J. "After a good deal of consideration, I am of the opinion that the commissioners of assessments, in determining the amount for which the relator should be assessed, did right, after deducting from \$740,000, the amount of their capital stock paid in, or secured to be paid in, the sum of \$188,834.84 paid for their real estate, in refusing to de-

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duct the further sum of \$103,000, the portion of their capital stock invested in stocks of the United States.

The question has been somewhat complicated by the amendments in 1853 and 1857 to title 4 of chapter 13 of part 1st of the revised statutes, (1 *R. S.* 414,) but I think, notwithstanding these amendments, the commissioners did right in refusing to make the deduction. There is no doubt that by the provisions of this title, as they were before these amendments, the relators were liable to taxation on the amount of their capital stock *paid in, or secured to be paid in*, after deducting the sums paid for real estate, and the amount of their stock, if any, belonging to the state or to incorporated literary and charitable institutions, *irrespective of its investment at all, or if invested, irrespective of the manner of its investment and of its accumulations, or losses, or value.* (1 *R. S.* 414, tit. 4, §§ 12. 6, 10. *The People v. Supervisors of Niagara*, 4 *Hill*, 22. *Bank of Utica v. City of Utica*, 4 *Paige*, 399.) Under the provisions of the revised statutes, before the act of 1857, the relators were liable to be taxed on the nominal amount of their stock itself, *paid in, or secured to be paid in*, and not upon its value. By the act of 1853, (*Laws of 1853, ch. 654*,) they were liable to be taxed, not only upon the nominal amount of the stock paid in, or secured to be paid in, but also upon the amount of all surplus profits or reserved funds, exceeding ten per cent of their capital, after deducting the amount paid for their real estate, and the amount of their stock, if any, belonging to the state, &c. By the laws of 1857, (*vol. 2, ch. 456*,) 'The capital stock of every company liable to taxation, except such part of it as shall have been excepted on the assessment roll, or shall have been exempted by law, together with its surplus profits or reserved funds, exceeding ten per cent of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations, actually owned by such company, which are taxable upon their capital stock under the laws of this state, shall be assessed at *its actual*

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value, and taxed in the same manner as the other personal and real estate of the county.'

I am aware that a very strong argument can be made, for such an argument was made by the counsel for the relators in this case, to show, that to hold in this case, under the provisions of the revised statutes, as thus amended, that the relators are liable to taxation on their capital stock, to be assessed at its actual value, without reference to its investment, or to what it is invested in, would be an evasion of the constitution of the United States, and of the decisions of the federal court under it, and a sacrifice of substance to form. But without undertaking to answer this argument at large, I will say, that sometimes words are things, and as the legislature have chosen to say that the capital stock of the company, paid in, or secured to be paid in, shall be taxed at its actual value to the shareholders, irrespective of the mode or manner of its investment, I am not willing to circumscribe state sovereignty by holding that they had not power to say so.

The capital stock of the company is taxable as a distinct thing, from the stock which it holds in other companies. The holders of its shares might have been taxed for their several shares, but these shareholders are not taxed as such, and the company is to be taxed for all the shares except those belonging to the state, &c. It is the shares of its own stock which are taxable at their actual value, and not the shares which the company own of the stock of other companies, or of the public stock of the United States. The assessment complained of in this case, by the Bank of the Commonwealth, was not on the United States stock held by the bank, but on its own stock, as a distinct thing, and as such having a known and distinct value.

In the case of *Western v. City of Charleston*, in the supreme court of the United States, (2 *Peters*, 449,) the tax was imposed on the United States stock, "*eo nomine*." In *McCulloch v. State of Maryland*, (4 *Wheaton*, 436,) it was held, that the interest which a citizen held in the Bank of the

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United States was taxable by the state. In the case of the *British Commercial Insurance Co. v. The Commissioners of Taxes*, decided at special term of this court, July, 1858, and at general term, December, 1858, the stock deposited with the comptroller did not consist of shares of the company's own capital stock, but was a distinct fund, or deposit of stock.

Upon the whole, I am of the opinion that the relators are bound to pay the tax, as assessed by the commissioners, and that the proceedings of the commissioners should be affirmed, with costs."

From the judgment in pursuance of this opinion the relator appealed to the general term.

A. M. Bradford and Irving Paris, for the appellants.

R. F. Andrews, for the respondents.

By the Court, BONNEY, J. The question to be determined in this case is of very great importance, and should receive a more deliberate and careful examination than the press of business in this court will permit us now to give to it. The case, however, will undoubtedly be carried to the court of last resort, for final adjudication, and I have therefore less hesitation in stating the conclusion at which, upon brief consideration, I have arrived.

The decision of the case, in my opinion, depends entirely upon the construction to be given to the statutes concerning the assessment of taxes on incorporated companies as amended by the act passed April 15th, 1857, (*Laws of 1857, vol. 2, ch. 456, p. 1.*) and, for the purposes of this decision, I assume that all stocks of the United States are exempt from taxation by the state governments; and not only that *such stocks cannot be so taxed, eo nomine*, but that individuals who are the owners and holders thereof cannot be taxed for the amount or value of the same as for personal property owned by them. (1 *Kent's Com.* 425, &c. 6th ed. *Weston v.*

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City of Charleston, 2 *Peters' U. S. R.* 449. *McCulloch v. State of Maryland*, 4 *Wheat.* 316. *International Life Ass. Society v. Com'rs of Taxes*, 28 *Barb.* 318.) This relator, the Bank of the Commonwealth, is a domestic corporation created by and under the laws of this state, and subject to its authority and legislation.

The statutes of this state relative to this subject, as amended in 1857, provide as follows: (1 *R. S.* 944, &c. 5th ed. § 1:) All moneyed or stock corporations, deriving an income or profit from their capital or otherwise, shall be liable to taxation *on their capital* in the manner hereinafter prescribed. § 3. The president &c. of every such incorporated company shall, on or before the first day of July in each year, make and deliver to the assessors a written statement, specifying; 1. The real estate (if any) owned by such company, where situated, and the sums actually paid therefor; 2. The capital stock, actually paid in and secured to be paid in, excepting therefrom the sums paid for real estate and the amount of such capital stock held by the state and by any incorporated literary or charitable institution; and 3. The town or ward in which the principal office of the company is situated or its business is carried on, or in which it is liable to be taxed. § 7. The assessors shall enter in their assessment rolls as follows: 1. In the first column, the name of each incorporated company liable to taxation, and, under its name, shall specify the amount of its capital stock paid in, the amount paid by such company for real estate then belonging to it wherever situated, the amount of its surplus profits or reserved funds, exceeding ten per cent of its capital after deducting therefrom said amount of said real estate, and the amount of its stock (if any) belonging to the state and to incorporated literary or charitable institutions. 2. In the second column, the quantity of real estate owned by such company within their town or ward; and, in the third column, the actual value thereof estimated as in other cases. 3. In the fourth column, the amount of capital stock of every such

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company paid in and secured to be paid in, and of all such surplus profits or reserved funds as aforesaid, after deducting the sums paid out for real estate then belonging to it, and the amount of stock (if any) belonging to the state and to incorporated, literary and charitable institutions. § 10. "*The capital stock of every company liable to taxation except such part of it as shall have been excepted in the assessment roll, or as shall have been exempted by law, together with its surplus profits or reserved funds, exceeding ten per cent of its capital after deducting the assessed value of its real estate, and all shares of stock in other corporations, actually owned by such company which are taxable upon their capital stock under the laws of this state, shall be assessed at its actual value and taxed in the same manner as other personal and real estate of the county.*"

Under these statutory provisions the assessment in this case has been made on said balance of the capital stock of the relator, and, as it appears to me, in exact accordance with those provisions. There is no question here of surplus profits or reserved funds, or as to the *actual value of the stock*, (whatever may be the meaning of that phrase as used in § 10 above referred to,) neither does it appear *that any part of said stock* was held by the state or by any incorporated, literary or charitable institutions; or was excepted in the assessment roll, or was by law exempted from taxation.

But the relator insists that a deduction should have been made, *not of any particular part or shares of the stock*, as being for any cause exempt by law from taxation, but of the sum of \$103,000 from the aggregate amount of the whole capital stock not invested in real estate, for the reason that such an amount (\$103,000) of the moneys paid in for shares in said capital have been, by the bank, invested in stocks of the United States, and that such U. S. stocks are not subject to taxation by state authority.

Under the statutes above referred to, as I understand them, taxes are assessed upon *the amount of the capital stock* of a

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corporation ascertained in the manner prescribed: and not upon any property purchased or otherwise obtained by the corporation, or in which such capital or any part thereof may be invested, excepting only the real estate held by the company, which is subject to special rules of taxation, and must be assessed at the place where situated, whether in this state or elsewhere; and it is to be observed that the statute neither requires nor authorizes the insertion in any entry in an assessment roll made under § 3 above referred to, of any account or statement of the use made by a corporation of any part of its capital or other property, excepting only that part which has been used in the purchase of real estate, nor any specification of the personal property held by such corporation.

These statutes clearly require that every moneyed or stock corporation shall be assessed for, and pay taxes upon, the whole amount of the balance of its capital stock paid in, and remaining after deducting the shares of stock, excepted or exempt as above mentioned, and such sum as shall have been invested in real estate, notwithstanding a portion, or even the whole, of such balance may be invested in stocks of the United States held by such corporation. And this construction, in my opinion, does not, as has been contended, conflict with the decision in the case of the *British Commercial Life Ins. Co. v. Comm'rs of Taxes*, (28 Barb. 318.) That Life Insurance Company was a foreign corporation, using a portion of its property in carrying on business in this state, and under the laws of the state liable to taxation therefor. It stood in the same position as a non-resident natural person, and the assessment was on the property held and used in business in this state, and not upon any shares or portion of the capital stock of the company.

Neither, as I understand them, are the definitions of the terms "*capital stock*," or "*capital*," given in the opinions in the case of the *Mutual Ins. Co. of Buffalo v. Supervisors of Erie*, (4 Com. 442,) in any respect inconsistent with this construction.

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But it is urged on behalf of the relator that said statutes of this state, if such be their true construction, are unconstitutional in so far as they provide for or authorize taxation by state authority of any part of the capital stock of the corporation which is invested in stocks of the United States. I cannot assent to that proposition. The state of New York has, by its laws, created or authorized the formation of this Commonwealth Bank and other like corporations, granting to them certain powers and privileges; and has also provided by law for the taxation of the capital stock of every such corporation. As soon as the capital stock is paid in it becomes, *as stock*, the subject of, and liable to, taxation; and as I view the law, it must, during the continuance of the corporation, remain so liable as stock irrespective of the property in which the money paid for the stock may be invested, or any use that may be made of such money by the corporation; and if any part of the money paid in for its stock shall at any time be invested in stocks of the United States, such investment cannot affect the right of taxation, for the reason that the assessment of taxes is not upon the stocks of the United States, or other property owned or held by the corporation, excepting only its real estate, but continues to be as it was before such investment was made, an assessment on the capital stock of the company created under the laws of the state and thereby expressly made the subject of taxation. The corporation which accepts and enjoys the privileges granted by the state must take them *cum onere*. And in my opinion there is no foundation for the suggestion made on the argument of this case, that the decision by the court below is an evasion of the admitted rule of law that U. S. stocks are not liable to taxation by state authority. It is not in form merely but in fact and in principle that this assessment is *upon the capital stock of the relator*, and not upon the property in which the money paid in for that capital is invested; which property may be, and doubtless is, changing from day to day. But to permit the relator to

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escape taxation upon so large a portion of its capital because it has seen fit to invest the money received for such portion in stocks of the United States, would, in my judgment, be an evasion of the law of the state which created the corporation and made it liable to pay taxes on the amount of its capital.

The order made at special term should be affirmed with costs.

Order affirmed.

[NEW YORK GENERAL TERM, September 17, 1860. *Sutherland, Bonney and Leonard, Justices.*]

DEVLIN vs. BRADY.

An agreement between M. and B., to the effect that M., in consideration of the giving of a promissory note by B. for \$3000, would use his supposed influence with the street commissioner of the city of New York, and by such influence induce a favorable settlement and allowance of certain disputed claims and accounts of B. against the city corporation, the allowance of which could not be obtained without such influence; *Held* illegal, and that no contract made in consideration thereof could be enforced by law.

And where a promissory note, given as the consideration of such an agreement to M. was indorsed by the latter to the plaintiff, with notice of the facts, who procured the same to be discounted by a bank for his own benefit, and he himself received the proceeds of the discount, and the plaintiff, after the note was dishonored and in the hands of the bank, took it up and paid to the bank the amount thereof; *Held* that he was not entitled to stand in the shoes of the bank, which received it before maturity, and paid value for it, in good faith; but that his position and rights, as against the prior parties thereto, were the same as if he had never parted with the note.

THIS action was brought on a promissory note stated to have been made by the defendant, payable to his own order, and by him indorsed and delivered to George Mountjoy, who indorsed and delivered the same to a third person, by whom, it was alleged, the note was, before maturity, transferred and delivered to the plaintiff for a valuable consideration. The defense set up by the answer was that the note was

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made and delivered without consideration, or upon an illegal consideration, of which the plaintiff had notice when he received it. The jury, under the charge of the court at the circuit, rendered a verdict for the defendant. The plaintiff, on exceptions taken at the trial and stated in the case made, moved, at special term, for a new trial; which motion was denied, and from that decision the plaintiff appealed.

J. E. Burrill, for the plaintiff.

J. McKeon and *C. L. Monell*, for the defendant.

By the Court, BONNEY, J. At the trial of this action exceptions were taken by the plaintiff to the admission of certain questions proposed to the defendant, called as a witness on his own behalf, on the ground that the notice of his examination, given under section 399 of the code of 1857, was defective. I think the notice was sufficient to authorize the examination of the defendant; and this exception does not appear to have been referred to on the motion at special term, or there considered by the court.

After the evidence was closed, the plaintiff's counsel requested the court to charge the jury, "*that the agreements alleged in the answer and established by the testimony were not illegal.*" The court refused so to charge, and the plaintiff's counsel excepted. I have no doubt that this decision was correct. The agreement alleged in the answer, and referred to in this request, was in effect that Mountjoy, in consideration of the giving of this note by the defendant, would use his supposed influence with the then street commissioner of New York, and by such influence induce a favorable settlement and allowance of certain disputed claims and accounts of the defendant against the city corporation, the allowance of which could not be obtained without such influence. Such an agreement, in my opinion, would be illegal, and no contract made in consideration thereof could be enforced by law.

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(See *Harris v. Roof's Ex'rs*, 10 Barb. 489; *Rose v. Truax*, 21 id. 361; *Gray v. Hook*, 4 Comst. 449.) The principle on which these cases were decided appears to me to be applicable to and decisive of this point.

It was proved that the note in question was indorsed by Mountjoy and delivered to the plaintiff, who indorsed and delivered the same to the Bowery Bank, by which it was discounted for the plaintiff and the proceeds of the discount were received by him, and that after the note was dishonored the plaintiff received back the note and paid said bank the amount due on it, and then brought this action thereon; and the plaintiff's counsel, in substance and effect, requested the court to charge, that if the Bowery Bank received the note from the plaintiff before maturity and paid value therefor, in good faith, and without notice of the consideration or purpose for which it was given, and the plaintiff, after the note was dishonored in the possession of the bank, took it up and paid to the bank the amount thereof, he was entitled to "stand in the shoes of the bank," and could recover on the note, although he knew the facts in relation to the making of the note when he first held it, before he procured it to be discounted. The court refused so to charge, and the plaintiff's counsel excepted. In my opinion there was no error in this decision. The plaintiff procured the note to be discounted for his own benefit, and himself secured the proceeds of the discount, and when the note was returned to him after maturity, his position and rights, as against the prior parties thereto, were the same as if he had never parted with it. The use which he had made of the note could not, in my judgment, make his rights against the maker or indorser greater than they were before.

The court charged the jury that the question for them to determine was whether there was a consideration for the note, and if there was not, whether the plaintiff, when he received the note from Mountjoy, knew or had notice of such want of consideration; that a note given to procure improper influ-

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ence to be used with a public officer was void ; that any influence would be improper if the parties contemplated or intended an influence arising out of the relations existing between the employee and the officer ; and the jury must determine from the evidence whether such an influence was designed or contemplated between the defendant and Mountjoy ; that it was immaterial whether the consideration of the note was illegal or the note was without consideration ; in either case the plaintiff could not recover if he had notice of the illegality or want of consideration, at the time when he received the note.

After some remarks in relation to the testimony of the defendant and its effect, and saying that notice might be inferred from circumstances, the court added, "In any view of the case notice is the important thing. If you believe Brady you cannot doubt that Devlin knew all about the note when he took it ; while if you believe Devlin he knew nothing about it." To which the plaintiff's counsel excepted.

If this exception is to be considered as intended to apply to the whole of the preceding charge, it is too broad to be available ; if applicable to the last clause only, in my judgment it is not well taken. Indeed I do not see that the whole of this charge, taken together, is materially objectionable.

The residue of the charge, although stated in three paragraphs, to each of which a separate exception was taken, in effect amounts only to this ; that if the jury found that the consideration of the note was illegal, and that the plaintiff had notice of its origin and consideration when he first took the note, he could not, in any view of the case, recover upon the evidence before the court and jury. This is clearly unexceptionable ; and in my opinion no error is shown to have been committed at the trial, which requires or authorizes the court to interfere with the verdict found by the jury.

The order made at special term, denying the motion for a new trial, should be affirmed with costs.

[NEW YORK GENERAL TERM, September 17, 1860. *Sutherland, Bonney and Mullin, Justices.*]

LEE and others *vs.* GEORGE SELLECK, impleaded with Benjamin Selleck.

The general rule or principle is, that the construction, force and effect of a contract, and the rights of the parties under it, as distinguished from their remedies on it, are to be determined by the law of the place of the contract, unless the parties contemplated another place for performance; and if they did, then the law of the place so contemplated is to prevail.

Upon a sale of goods by the plaintiffs to B. S., in the city of New York, it was agreed between the parties that B. S. should give his promissory note for the price, to be indorsed by G. S. a resident of M. in the state of Illinois. A note, payable to the order of G. S. at M. was accordingly made and signed by B. S. and by him forwarded to G. S. in Illinois. G. S. on receiving the note, indorsed it, and sent the same by mail to B. S. at Beloit, Wisconsin, who enclosed the note, thus indorsed, to the plaintiffs at New York. *Held* that the note, and the indorsement, were independent contracts; the former to be performed in Illinois, and the latter in New York. That both the note and the indorsement were to be deemed made in New York; and that the question of the liability of G. S., as indorser, was to be determined by the law of New York, and not by the law of Illinois.

Accordingly *held* that a recovery could be had, in this state, against the indorser, without proving any attempt to collect the note of the maker by a suit against him.

THIS was an action brought against the defendant George Selleck as indorser, and Benjamin Selleck as maker of the following note:

"Dollars 3,378 ⁷⁴/₁₀₀.

New York, August 19, 1857.

Eight months after date, I the subscriber, of Beloit, Rock county, state of Wisconsin, promise to pay to the order of George Selleck, thirty-three hundred seventy-eight and 75-100 dollars, at George Selleck's Bank, Morris, Illinois, value received with current exchange on New York.

BENJ. SELLECK.

(Indorsed.) Payable to order, Lee, Murphy & Avery.

GEORGE SELLECK."

George Selleck, only, was served with process. The note was given for goods purchased of the plaintiffs by the maker, at New York: the defendant, having by telegraph agreed to indorse the note, before the goods were delivered. On this

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promise the goods were delivered, and the note forwarded to the defendant, at Morris, Illinois, for indorsement; it was indorsed by him and sent to the plaintiffs by the maker. When it became due, it was duly presented at Morris and protested for non-payment, and the plaintiffs proceeded thereon, by attachment against the defendant George Selleck, as a non-resident debtor, and attached moneys belonging to him in the Park Bank, N. Y., sufficient to secure the debt. This action was commenced by the attachment. The plaintiffs reside in New York; the maker of the note, at its date and maturity, resided at Beloit, Wisconsin; the defendant resided at Morris, Illinois. The defence arose under the statutes of Illinois, which require the holder of negotiable paper to proceed to judgment and execution against the maker, before an action will lie against the indorser. The action was tried by the court without a jury, and judgment ordered in favor of the defendant George Selleck, for his costs. The plaintiff appealed.

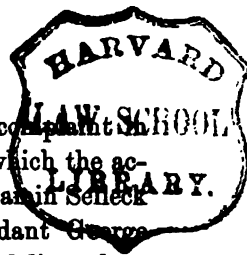
P. Y. Cutler, for the plaintiffs.

L. S. Chatfield, for the defendant.

By the Court, SUTHERLAND, P. J. The complaint in this action alleges that the promissory note on which the action is brought, was made and delivered by Benjamin Selleck in the city of New York, and that the defendant George Selleck indorsed the note, and caused it to be delivered to the plaintiffs in the city of New York.

The note on its face purports to have been made in New York; that is, it is dated at New York; and is payable at the bank of the indorser, George Selleck, Morris, Illinois.

George Selleck by his answer admits the execution, indorsement, and delivery, and non-payment and notice of non-payment of the note as set forth in the complaint, but alleges that the note was indorsed by him at the town of Mount Morris in the state of Illinois, and that his contract of indorsement was made with reference to the laws of that



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state, and was intended to be governed thereby; and he further alleges, that it is, and was the law of Illinois at the time he indorsed the note, that the indorser is liable only after an unavailing attempt by judgment against the maker to collect the note; and that no such judgment has been obtained against the maker.

The learned justice before whom the action was tried without a jury, found as facts; that Benjamin Selleck made and George Selleck indorsed the note, and that the same was duly presented for payment at the defendant, George Selleck's Bank at Morris, in the state of Illinois, and that payment was then and there demanded and refused, whereupon the note was duly protested for non-payment, and notice thereof given to the defendant George Selleck. He further found as facts, that at the time of the making of the note, the maker Benjamin Selleck was, and has continued to be a resident of Beloit, in the state of Wisconsin, and was at the time of making the note and ever since has been solvent; that the note was made by Benjamin Selleck in the city of New York, and by him forwarded thence to George Selleck at Morris, Illinois, where he then resided, and has continued to reside, for indorsement; and that George Selleck there wrote his indorsement thereon and thence returned the same to Benjamin Selleck at Beloit, Wisconsin, by whom the same was thence inclosed in a letter, and there mailed to the plaintiffs in New York, where the plaintiffs received it with George Selleck's indorsement thereon. The learned justice further finds that the note so made and indorsed was given for goods, sold and delivered by the plaintiffs to the defendant Benjamin Selleck, in the city of New York, on an agreement by him with them, to give said note so indorsed for the goods; and that the note was received by the plaintiffs by mail as aforesaid, about ten days after the sale and delivery of the goods. He further finds the law of Illinois to have been, at the date and maturity of the note, as alleged in the answer.

On these facts, the learned justice finds as a conclusion of

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law, that the law of the state of Illinois governs the contract of indorsement and the liability of the indorser; and finding further, that the residence of the maker in Wisconsin at the time of the making and indorsement of the note, did not by the Illinois law relieve the plaintiffs from the necessity of prosecuting the maker to judgment before resorting to the indorser, decided that the plaintiffs were not entitled to recover against the defendant George Selleck, and that he was entitled to judgment against the plaintiffs for his costs; it having been admitted by the plaintiffs on the trial, that no suit or other proceedings had been commenced by the plaintiffs against the maker, Benjamin D. Selleck, except this action, and that he had not been served with process in this action.

The plaintiffs duly excepted to the conclusion or finding as matter of law, that the law of Illinois governed the contract of indorsement, and that the liability of George Selleck as indorser was to be determined and enforced according to that law; and the question is, whether this conclusion or finding was or was not erroneous. I think it was clearly erroneous. The general rule or principle is, that the construction, force and effect of a contract, and the rights of the parties to a contract under it, as distinguished from their remedies on it, are to be determined by the law of the place of the contract, unless the parties contemplated another place for performance; and if they did, then the law of the place so contemplated as the place of performance is to prevail. (*Hyde v. Goodnow*, 3 Comst. 267. *Everett v. Vendryes*, 19 N. Y. R. 436. *Aymar v. Sheldon*, 12 Wend. 439. *Smith v. Smith*, 2 John. 235. *Williams v. Wade*, 1 Metc. 82.)

If the contract is in writing, and the place of performance appears from the contract or writing itself, then of course the contract or writing itself is conclusive as to the law of the place which shall determine its construction, force and effect. (*Thompson v. Ketcham*, 8 John. 190.)

The note made by Benjamin Selleck, and the contract cre-

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ated by the indorsement of George Selleck, were independent contracts; the first was to be performed in Illinois; that is, the note was payable at Morris, in that state; but where was the contract of indorsement to be performed? Can there be a doubt, on the facts found by the learned justice, that the parties contemplated that the latter contract was to be performed in New York? What was the contract created by the indorsement? By indorsing the note, George Selleck undertook that if, when duly presented, it was not paid by the maker, he, the indorser, would upon being properly notified of the non-payment, pay the same to the indorsee, or other holder. Where? Can there be a doubt, that the indorser and indorsee contemplated, if the indorsee retained the note, that in default of payment by the maker, the indorser was to pay to the indorsee in New York? The maker, by the note, promised to pay at Morris, Illinois, but the indorser by his indorsement promised to pay to the indorsee in New York, if the maker did not pay at Morris, Illinois. The contract of indorsement was not only to be performed in New York, but on the facts found by the justice, the note and the contract of indorsement were both made in New York. Neither had any force or effect until they were delivered; and the note with George Selleck's name on it, was delivered to the plaintiffs in New York. This delivery and the acceptance by the plaintiffs, made both the note and the contract of indorsement effective instruments or things; and therefore it can be said with propriety and truthfulness of language, that both the note and the indorsement were made in New York. (*Hyde v. Goodnow*, 3 *Comst.* 267, *above cited.*)

It follows, that the question of George Selleck's liability as indorser was to be determined by the law of New York, and not by the law of Illinois; and that there should be a new trial of this action, with costs to abide the event.

[NEW YORK GENERAL TERM, September 17, 1860. *Sutherland, Allen and Bonney*, Justices.]

AKIN vs. BLANCHARD, impleaded, &c.

A party dealing with a corporation is presumed to know the extent of its corporate powers; that is, he is bound to know the law; but he has a right to presume, in the absence of express notice to the contrary, that the corporation does its duty and acts within and according to, its charter.

Where a party takes, from the holder thereof, the note of a third person, payable to the order of, and indorsed by, an insurance company, paying value therefor, he has a right to presume that the note was transferred in pursuance of a resolution of the board of directors; and is therefore a bona fide holder for value, without notice.

APPEAL from a judgment entered at the circuit, dismissing the complaint, with costs. The action was upon a promissory note, for \$641.25, made by the defendant on the 22d of May, 1855, payable to the order of the Atlas Mutual Insurance Co. twelve months after date. The action was tried at the New York circuit, in February, 1858, before a justice of the court without a jury, a jury being waived. The court specified as the facts found, the following: That the promissory note on which the action was brought, was made and delivered by the defendant, Albus R. Blanchard, to the Atlas Mutual Insurance Company, in payment of a premium for insurance. That said note was, with other notes, amounting to \$20,307.50, on the 27th day of September, 1855, delivered, as per receipt of Wm. A. Brown, by the Atlas Mutual Insurance Company, to the said Brown, as collateral security for payment of a loan of \$20,000, on the day and at the time of such delivery, loaned by said Brown to the company. That said loan has not been paid. That said note was, at the time of the commencement of this action, held by the plaintiff. That the said note was, at the time of such delivery to Brown, indorsed as follows: "Pay for account of the Atlas Mutual Insurance Company.

GEO. H. TRACY, S'y."

That there was no resolution of the board of directors authorizing the transfer of said note. That William A. Brown took said note, with others, as collateral security for a loan

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of money to said company, and without express notice of the want of authority to transfer the same by the officers of the company. And the justice found as conclusions of law the following: That, by reason of such indorsement, and the want of a resolution of the board of directors of the said Atlas Mutual Insurance Company, the title to said promissory note did not pass, and the property therein remained in the said Atlas Mutual Insurance Company. That the plaintiff was therefore not entitled to recover thereupon, and that the complaint in this action should be dismissed with costs. Judgment was thereupon, on the 13th day of March, 1858, entered, dismissing the complaint in this action, and for costs in favor of the defendant against the plaintiff, amounting to \$75.16 as adjusted.

J. S. Ridgway, for the plaintiff.

G. Dean, for the defendant.

By the Court, SUTHERLAND, J. The judgment dismissing the complaint in this action should be reversed.

The plaintiff is a bona fide holder for value without notice, and within the exception to the 8th section of the statute.

A party dealing with a corporation is presumed to know the extent of its corporate powers; that is, he is bound to know the law; but he has a right to presume, in the absence of express notice to the contrary, that the corporation does its duty and acts within and according to its charter. These two legal propositions cover and determine all the questions in this case.

The plaintiff had a right to presume that the notes were transferred in pursuance of a resolution of the board of directors, and he is therefore, as he paid value, a bona fide holder for value without notice.

Judgment reversed.

[NEW YORK GENERAL TERM, May 7, 1860. *Sutherland, Bonney and Melvin*, Justices.]

DURANDO *vs.* DURANDO and others.

Where a person having a vested remainder in fee in real estate, subject to a life estate therein by another, dies before the tenant for life, leaving the latter seised of such life estate, his remainder in fee never having vested in him in possession, he is not seised, either in deed or in law, and his widow is not entitled to dower, either at common law or by statute.

APPEAL from an order made at a special term, allowing a demurrer to the complaint. The action was for the partition of land of which Paul M. P. Durando died seised.

J. C. Buckingham, for the appellant.

David Thurston, for the respondents.

By the Court, SUTHERLAND, J. The only material question presented by this appeal is, whether the appellant was entitled to dower in an undivided one-eighth of the real estate of which Paul M. P. Durando died seised, and in which one-eighth her husband, Peter L. P. Durando, at the time of his death, had a vested remainder in fee.

It seems perfectly settled that the appellant was not entitled to dower in such one-eighth, because her husband never had the possession, or the right of possession. His mother, under the will of his father, Paul M. P. Durando, took a life estate in all the real estate of the testator. Peter died before his mother, leaving her seised of this life estate. As Peter's remainder in fee never vested in him in possession, he was never seised, either in deed or in law.

Seisin has been defined to be the *possession* of a freehold estate. (3 *Litt.* § 324. 8 *N. H. Rep.* 57. 4 *Mass. Rep.* 408.) Seisin in fact or in deed, the actual possession; seisin in law, the right to the possession.

As the appellant's husband was never seised in deed or in law, she was not entitled to dower, either at common law or under our statute. (*Co. Litt.* 31 a. 4 *Kent's Com.* 37. 39.

Landsberger v. Magnetic Telegraph Company.

Green v. Putnam, 1 Barb. S. C. R. 506. *Beekman v. Hudson*, 20 Wend. 53. *Safford v. Safford*, 7 Paige. 259.)

The order of the special term should be affirmed.

[NEW YORK GENERAL TERM, September 17, 1860. *Sutherland, Ingraham and Bonney*, Justices.]

LANDSBERGER and others vs. THE MAGNETIC TELEGRAPH COMPANY.

Measure of damages, in an action against a telegraph company, for neglecting to deliver a dispatch.

The general rule of damages laid down in *Griffin v. Colver*, (16 N. Y. R. 489,) recognized as the settled rule of law in the state of New York, upon a breach of contract.

THIS was an appeal from a judgment entered upon the report of a referee. The action was brought to recover damages of the defendant for neglecting to deliver a telegraphic dispatch from New Orleans to New York, according to agreement. The referee reported in favor of the plaintiffs for \$16.09.

Levi A. Fuller, for the appellants.

James M. Smith, jun. for the defendant.

By the Court, BONNEY, J. The only question in this case is one of damages. In December, 1856, the plaintiffs, at San Francisco, California, contracted with Locan & Co. of that place, to purchase for them, in New York, on commission, 300 Colt's pistols, (revolvers,) and to deliver such pistols in San Francisco, by the steamer which should leave New York on the 20th January, 1857; for which the plaintiffs were to receive a commission of 7½ per cent on the cost of the pistols; and they agreed to "hold themselves responsible to the sum of five hundred dollars, to be paid to Locan & Co. by them, if they failed to fulfill the agreement."

For the purpose of executing this agreement the plaintiffs

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remitted, from San Francisco, by the Pacific Mail Company, the sum of \$10,000, which arrived in New York on 13th January, 1857. One of the plaintiffs left San Francisco for New York, via Nicaragua, on 20th December, 1856, expecting to reach New York by 12th January, 1857, in time to purchase said pistols; but was (with the other passengers on the same voyage) made prisoner by the Costa Ricans, and detained so that he did not arrive in New York until 24th January. That this contract might not fail to be executed, by reason of such detention, the plaintiffs, at an expense of \$50, sent, by special messenger, from Nicaragua to New Orleans, a telegraphic dispatch communicating information necessary for the performance of the contract, addressed to "*J. Landsberger & Co. 28 Broad street, New York*, (the plaintiff's firm in New York,) containing the following words: "*get ten thousand dollars of the Mail Company.*" This dispatch was received by the defendants in New Orleans, for transmission by telegraph, on 16th January, and, on 17th January, was transmitted to and received at their office in New York, but addressed to "*H. P. Lammeyer.*" No such person was found in the New York directory, and on said 17th January a copy of the dispatch was mailed to "*H. P. Lammeyer,*" and the defendants telegraphed to the office in New Orleans "for better address." From 17th to 23d January, communication by their telegraph line was interrupted by storms at the south, and the defendants did not get a reply to said office message until the night of 22d January, when they received, at their office in New York, the correct address, "*J. Landsberger & Co., 28 Broad street,*" and on the morning of 23d January they delivered the dispatch to its proper address. By reason of the non-delivery of that dispatch before 20th January the plaintiff's agreement with Locan & Co. was not, and could not be, performed for want of the money in the dispatch mentioned; and the plaintiffs paid Locan & Co. on demand, as liquidated damages for the non-performance of that agreement, \$500.

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The sole cause of the non-delivery of the dispatch, on or before 18th January, was the erroneous address received at the defendant's office in New York, and this was manifestly caused by the default or negligence of the defendants, and the referee has so found. The plaintiffs claim to recover as damages.

Commissions on the purchase of the pistols, to which they would have been entitled if the contract had been performed,-----	\$462 00
The amount paid to Locan & Co. as damages for non-performance, -----	500 00
Amount paid defendants for transmitting the dispatch,-----	6 50
Interest on \$10,000, the receipt of which by plaintiffs in New York was delayed five days by the non-delivery of said dispatch to them,-----	9 59

The referee allowed only the two last items of damages, and reported \$16.59 for the plaintiffs, for which judgment was entered, with costs to the defendants. The plaintiffs excepted and appealed.

It is perfectly clear, in my judgment, that by reason of the non-performance by the defendants of their agreement to transmit and deliver immediately the telegraphic dispatch above referred to, the plaintiffs have sustained the first two items of damage above mentioned as well as the other items, and that such non-performance was occasioned by the defendants' negligence, for which they are liable to the plaintiffs in damages; and yet I am constrained to concur with the referee in the conclusion at which he arrived, that the amount of said two first items cannot be recovered against the defendants in this action.

The rule of damages applicable to this and other like cases is clearly stated in the opinion of Judge Selden, (in which all the judges of the court of appeals concurred) in the case of *Griffin v. Colver*, (16 N. Y. Rep. 489,) as follows: "The broad general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented

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as well as losses sustained ; and this rule is subject to but two conditions. The damages *must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract ; that is, must be such as might naturally be expected to follow its violation.*" " And they must be certain both in their nature and in respect to the cause from which they proceed."

The first of these conditions appears to me to exclude said first two items of damage. On receiving this dispatch for transmission, the defendants had no information whatever in relation to it, or the purposes to be accomplished by it, except what could be derived from the dispatch itself. The effect of any delay in the delivery of the dispatch would naturally and necessarily be equal delay in the receipt by the plaintiffs, in New York, of the \$10,000 therein mentioned. The defendants were not informed of any special use intended to be made of this sum of money ; and what damage might they naturally expect to follow from the delay in the receipt of it ? Clearly, the loss of the use of that sum during the time that its receipt was delayed, and the damages for the loss of such use are, by the laws of New York, determined to be the interest on the money for the period of the delay, at seven per cent per annum.

The rule laid down, and the illustrations thereof given, in the opinion referred to, appear to me entirely decisive of the present case, and to fully sustain the judgment of the referee.

By the case of *Hadley v. Brazendale*, (26 *Eng. L. and E. Rep.* 398,) it appears that the same rule is recognized and acted upon in the English courts. The late decision in our court of last resort, above referred to, must be considered as stating the settled rule of law in this state, and renders it unnecessary to refer to any other of the numerous authorities on this question.

The judgment must be affirmed, with costs.

[NEW YORK GENERAL TERM, September 17, 1860. *Sutherland, Allen and Bonney*, Justices.]

THE NEW YORK ICE COMPANY *vs.* THE NORTH WESTERN
INSURANCE COMPANY

After final judgment, dismissing a complaint, has been duly rendered and entered, which judgment is precisely what it was intended to be, and disposes of the whole case, the court will not, in the absence of any allegation, or pretense of mistake or omission, amend such judgment, on *motion*, upon considerations not presented at the hearing, in order to give to the plaintiff relief not then contemplated.

A PPEAL from an order granted at a special term, permitting the plaintiff to amend the judgment in this action by which the complaint was dismissed.

By the Court, BONNEY, J. This action was tried at special term, and on the 23d of December, 1859, judgment was rendered that the complaint be dismissed without prejudice to the plaintiff's right to bring an action at law upon the policy of insurance set out in the complaint. On application of the plaintiff an order was made at a special term, on the 5th of July, 1860, that said order, (judgment,) dated 23d December, 1859, be amended as of 5th July, 1860, by adding, after the words "set out in the complaint," the words "or the plaintiffs may serve a new complaint at law in this action, on payment, by the plaintiffs to the defendants of all interlocutory costs since the filing of the complaint, and costs of this motion, ten dollars." From this order of July 5th the plaintiff has appealed.

By the terms of said policy the time within which an action may be brought upon it is limited, and that time has expired; and the amendment of this judgment is therefore necessary to enable the plaintiff to prosecute an action at law upon it. The amendment appears to me not unreasonable or inequitable, but I do not see that the court has any power to make it. Final judgment dismissing the complaint was duly rendered and entered. And there is no allegation or pretense of any mistake or omission therein.

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The judgment is precisely what it was intended to be, and disposes of the whole case. The amendment has been asked for and granted upon considerations not presented to the court at the hearing, and is intended to give to the plaintiff relief not then contemplated by any one. The code, (§ 173,) authorizes the court, *after judgment*, to amend any pleading, process or proceeding, by adding or striking out the name of any party; by correcting a mistake in any respect; by inserting other allegations material to the case; or conforming the pleadings or proceedings to the facts proved. But such authority does not reach this case.

In the case of *Clark v. Hall*, (7 Paige, 382,) it was held by the chancellor that a decree cannot be varied in substance, without a re-hearing; but that it may be amended or corrected on motion, as to mere clerical errors, or by inserting any provision or direction which would have been inserted, as a matter of course, if the same had been asked for at the hearing, as a necessary or proper clause to carry into effect the decision of the court.

This case states the power to amend a decree or judgment, on motion, in as broad terms as any that has been cited or fallen under my notice; but in my opinion it is not authority for making the order now before us. And in my judgment that order should be reversed, with ten dollars costs of appeal, to the appellant.

[NEW YORK GENERAL TERM, September 17, 1860. *Sutherland, Ingraham and Bonney*, Justices.]

BLANCO vs. FOOTE and others.

No mere purchaser at a sheriff's sale can, before completing his purchase and taking title, maintain an action in relation to the premises sold, against any person not a party to the suit in which the judgment of sale was rendered. A party becoming the inchoate purchaser of premises, at a sheriff's sale, under a judgment of foreclosure, by making the highest bid, paying ten per

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cent of the sum bid, and signing a memorandum of purchase, will not acquire such a right to, or interest in, the premises as will entitle him to maintain an action against judgment creditors of a former owner, who were not parties to the foreclosure suit, for the foreclosure of their lien upon the premises by virtue of their judgment.

Neither will such purchaser, even after he has completed his purchase by paying the whole of the purchase money and taking his deed, be entitled to a judgment against such judgment creditors, foreclosing their lien under their judgment.

It seems the only relief to which the purchaser is entitled, in such a case, against the judgment creditors, is that they redeem the premises from his purchase within a specified time or be foreclosed; or a judgment declaring that their alleged judgment was not a lien on the premises, but only a cloud on the purchaser's title thereto.

THE complaint in this action, commenced in March, 1857, states among other things that the Emigrant Industrial Savings Bank, in August, 1856, commenced an action in this court against William Lynch and several others of the defendants in this suit, for the foreclosure of a mortgage, dated 7th July, 1852, for \$12,000, made by said Lynch, upon premises in New York known as No. 323 Greenwich street, and on the 11th of December, 1856, obtained a judgment, in the usual form, for the foreclosure of said mortgage and sale of the mortgaged premises, and payment out of the proceeds; to the plaintiff in that action of \$13,620.20 with interest; to the defendant William Lynch of \$15,721.51; and the balance, if any, into court. That, under said judgment, the mortgaged premises were offered for sale at auction, by the sheriff of New York, on the 9th of January, 1857, and on his bid of \$32,900 were struck off to the plaintiff in this action, who then paid 10 per cent of the amount bidden, and signed the usual memorandum of sale and purchase, to be closed on 29th of January, 1857. That Dennis Harris, on 1st December, 1855, conveyed said premises, by a deed, recorded 22d December, 1855, to William A. Mills; that, on the 2d of January, 1856, the plaintiff commenced an action in this court against Harris, and issued an attachment therein, and, on the 8th of January, 1856, filed notice of his pen-

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dens in that action, and on the 3d of April, 1856, recovered judgment against Harris for \$70,685.66, and issued execution, &c. That, in June, 1856, the plaintiff commenced an action against Harris and Mills to set aside said conveyance to Mills, and, on the 28th of October, 1856, obtained a judgment declaring such conveyance fraudulent and void as against the creditors of Harris; that, on the 1st of January, 1856, judgment was entered in this court in favor of Theodore C. Foote and Daniel D. Foote, against Harris, for \$4,607.96; that many other judgments, mentioned in the complaint, were recovered by other persons also made defendants in this action, against said Harris, between 13th February and 31st October, 1856; that informalities in the proceedings for the recovery of said judgment of foreclosure have also been discovered, which make the title, under that judgment, apparently defective and unmarketable; that the plaintiff is anxious to close his purchase and obtain a good title to the property sold, *and he prays* that his complaint may be considered and treated as in the nature of a supplement to said original complaint for foreclosure; that all the defendants in this action may answer; that said decree or judgment of foreclosure may be reformed and corrected; and all said liens be foreclosed by the judgment. That said sale, made to the plaintiff, may be confirmed; and the title to the premises be duly vested in him free and discharged from all said liens.

The defendants, Theodore C. and Daniel D. Foote, by answer, set up their judgment against Harris stated to have been recovered on 1st January, 1856, for \$4,607.90, which they allege became and was a lien on all real estate which Harris then or afterwards had in the county of New York, and generally deny or put in issue, all the other statements of the complaint. These defendants allege, that the greater part of their judgment is still due; and they claim to have a lien, prior to all other liens by judgment, on the premises, and that the plaintiff purchased the premises subject to such

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lien ; and they ask judgment that the plaintiff pay them the amount of their judgment against Harris, or that, as a trustee, he sell said premises, &c. or that the same be re-sold according to law, and out of the proceeds said judgment of these defendants be paid ; and for general relief.

To so much of this answer as claims affirmative relief the plaintiff *demurred*. Others of the defendants also demurred to the complaint, or answered.

The case was heard at special term on the several issues of fact and law therein, and judgment was rendered, on 26th October, 1857, whereby it was adjudged and decreed that the demurrers to the several answers be disallowed without costs ; that the decree made on 11th December, 1856, in the original action be in all things confirmed ; that the sheriff's sale, made on 9th January, 1857, to the plaintiff under said decree, be confirmed without costs ; that the plaintiff, Blanco, on 5th November, 1857, pay the balance of his bid, \$29,600, to the sheriff, and that the sheriff thereupon execute to him a deed ; that all the defendants in this action and all persons claiming under them be absolutely foreclosed ; and that the sheriff pay and dispose of the purchase money as in the original judgment for foreclosure directed. From this judgment the defendants, Theodore C. Foote and Daniel D. Foote, appealed.

By the Court, BONNEY, J. We have not been furnished with any opinion of the justice by whom this action was tried at special term, nor have the grounds on which his decision was rendered, been stated. In my opinion, the judgment, as against these appellants, cannot be sustained, for the following reasons: *First.* The plaintiff by his inchoate purchase of the premises in question, (having made the highest bid for them at sheriff's sale under judgment of foreclosure, paid 10 per cent of the sum bidden, and signed a memorandum of purchase,) acquired no such right to or interest in said premises, as entitled him to maintain this

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action, against the defendants Foote, for foreclosure of the lien which they were supposed to have on the premises by virtue of their judgment against Harris. This plaintiff might have refused to take the sheriff's deed, for the reason that the title was defective, if the judgment of these defendants was a valid lien, and the plaintiff in the foreclosure suit might then have taken such action as was necessary to perfect the title; but no mere purchaser at sheriff's sale, *before completing his purchase and taking title*, can, in my judgment, maintain an action in relation to the premises sold, against any person not a party to the suit in which the judgment for foreclosure was rendered. What rights he may have, or what action he might take as against the parties to the suit for foreclosure, it is not now necessary to inquire.

Second. If the plaintiff had completed his purchase, paid the whole purchase money and taken his deed, or had (as he supposed and insists) the right to maintain this action before completing, he would not, in my opinion, be entitled to the judgment against the defendants Foote which has been rendered in this case. He might have obtained a judgment that said defendants redeem the premises from his purchase within a specified time or be foreclosed; or declaring that their alleged judgment was not a lien on the premises, but only a cloud on his title thereto, if the facts alleged and proved warranted such judgment; but the judgment at special term, in effect, admits, that the defendants Foote had a valid lien on the premises, and forecloses and cuts off that lien by affirming and declaring valid against them a judgment in an action to which they were not parties, and a sale under that judgment, of which sale, so far as now appears, they had no notice, without giving them any right to redeem, or opportunity to purchase the premises, or procure them to be purchased by another party, for any amount greater than that bidden by the plaintiff therefor.

In my opinion this judgment, as against the defendants

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Theodore C. Foote and Daniel D. Foote, (who alone have appealed,) should be reversed, and the complaint as against them be dismissed with costs.

Judgment accordingly.

[NEW YORK GENERAL TERM, September 17, 1860. *Sutherland, Allen and Bonney*, Justices.]

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 MINER vs. BURLING.

In a proceeding before a justice of a district court, in the city of New York, by a landlord against his tenant, under the statute relative to summary proceedings to recover the possession of land, the justice has no power to summon talesmen, to form a jury.

The proceeding is entirely statutory, and must be conducted in strict accordance with the provisions of the law.

CERTIORARI to the justice of the district court of the city of New York for the fifth judicial district, to remove proceedings had before him, under the statute relative to summary proceedings to recover the possession of land, for the removal of Michael J. Miner from certain premises alleged to have been held over by him after the expiration of his term as tenant of William J. Burling.

By the Court, BONNEY, J. By the return to the certiorari, issued in this case to the justice of the fifth judicial district of the city of New York, it appears that Burling, as landlord, instituted summary proceedings against Miner, as tenant, to recover possession of premises, which, it was alleged, the tenant held over after the expiration of his term. The tenant appeared and filed an affidavit (which is not returned) and the matters controverted were tried by a jury.

The affidavit on which the summons was issued is loosely drawn, but may, I think, upon a very liberal construction, be deemed sufficient to give jurisdiction. The only issue tried

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appears to have been whether or not the premises were let to Miner for a year. The testimony was somewhat contradictory, and certainly left the question not free from doubt, but the finding of the jury cannot be disturbed on that ground.

It appears that, on the return of the summons, the tenant filed his affidavit and demanded a jury. The justice thereupon issued his precept, commanding twelve persons therein named to be summoned to try the matters in difference between the parties. Of the persons so summoned and appearing, only three were found free from objection, and qualified to act as jurors in this matter, and thereupon, on the order of the justice, *three "talesmen"* were summoned and sworn, (the tenant objecting) and sat on the trial. The tenant now insists that the justice had no power to summon talesmen to form a jury; that the trial was irregular, and illegal, and the warrant, issued on the verdict of the jury, was unauthorized by law and void.

This proceeding is entirely statutory, and must be conducted in strict accordance with the provisions of the law. The original act authorizing these summary proceedings directs the manner in which a jury, when required, shall be summoned, drawn and sworn, but makes no provision for talesmen. (2 R. S. 514, §§ 35, 36.) The act passed April 3, 1849, (*Laws of 1849, p. 291, ch. 193,*) by which the number of the jury, in cases of summary proceedings to recover possession of land, is reduced to six, gives no additional authority or direction in relation to summoning or drawing the jury. The act passed April 13, 1857, (*1 Laws of 1857, p. 727, § 77,*) authorizes the justices of the district courts in the city of New York to act in cases of summary proceedings; and by section 37, on page 718, directs and empowers such justices to cause talesmen to be summoned when necessary to complete a jury *for the trial of an issue of fact in an action pending in said court*; but the last mentioned section does not apply to or affect summary proceedings, (which are not actions,) before said justices. It is clear, then, as I think,

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that the jury in this case was not formed in the manner required by the statute, under which the proceeding was had, and the verdict, and the warrant issued thereon, are consequently void. The proceedings must be reversed, with costs.

[NEW YORK GENERAL TERM, September 17, 1860. *Sutherland, Allen and Bonney*, Justices.]

JAMES S. LIBBY and W. P. LIBBY vs. WILLIAM H. ADAMS.

What amounts to due diligence in serving upon an indorser notice of the dishonor of a promissory note.

APPEAL from a judgment entered at the circuit, dismissing the complaint.

Charles E. Soule, for the appellants.

John H. White, for the respondent.

By the Court, BONNEY, J. This action is against the defendant as indorser of three promissory notes which fell due in 1857. He denies having received notice of non-payment of any or either of the notes. By consent of parties the cause was tried before a judge at circuit without a jury, when the defendant being examined as a witness testified that he never was served with, or received notice of protest of either of the notes, and never knew they were not paid at maturity, until three or four months after the last note was due. That he had lived at his present place of residence, No. 59 East Twenty-fifth street, New York, for seventeen years, during all which time his name had been in the directory; and that he was one of the grantees of the Sixth Avenue Rail Road, and ten or twelve years before the trial attended meetings

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and received notices of meetings, directed to his residence, signed by the plaintiff James S. Libby.

The evidence on the part of the plaintiff showed that when the first note fell due it was delivered to a notary in the city of New York for presentment and protest; that he applied to said plaintiff, James S. Libby, for information as to the defendant's residence, and was told that he could learn it by inquiring at the street commissioner's office, or the comptroller's office; that he went to those offices and made inquiries, but could not learn his residence, "*and so put notices into the post office with the postage paid, directed to William H. Adams, New York city;*" that the first note was presented at the maker's place of business, to a woman in charge, who then told the notary's clerk, who presented the note, that she did not know where the indorsers lived. That the same clerk presented the second note for payment to the maker, and then asked him "if the indorser was the William H. Adams who was at the corner of 11th avenue and 29th street: the maker replied that he was," and thereupon such clerk proceeded there, and found the sign William H. Adams there, and left notice of protest with the person in charge. That when the last note became due said clerk presented it to the maker, "and then proceeded to the corner of 29th street and 11th avenue to serve notice of protest upon the indorser, and found the sign of William H. Adams was painted out; and he could not learn, though he made inquiry through the building, where he had removed to; and then he put notices in the post office." It was also testified by the defendant that the corner of 11th avenue and 29th street was not, and never had been, his place of business or residence; and it appeared that in the city directory for 1856—1857 there appeared three persons of the name of William H. Adams, of whom one was the defendant, whose place of residence was there correctly given.

The judge at the circuit dismissed the complaint, on the

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ground that the plaintiffs had not shown due diligence in serving notices of the dishonor of the notes.

We think the decision of the judge was erroneous as to the second of the three notes. On the presentment of that note, the maker told the person who presented it, that the William H. Adams who then had a place of business at the corner of 11th avenue and 29th street, was the indorser, and the notice was duly served on that William H. Adams. We are of opinion that under the circumstances this notice was sufficient to charge the defendant, although it was left at a wrong place and never was received by the defendant. (*See Catskill Bank v. Stall*, 15 *Wend.* 364; *Bank of Utica v. Davidson*, 5 *id.* 587; *Carroll v. Upton*, 2 *Sandf. S. C. R.* 171.) In relation to the other two notes we concur in opinion with the judge who tried the cause, that sufficient notice of their dishonor was not given to make the defendant liable as indorser.

The judgment must be reversed, and a new trial had; costs to abide the event of the action.

[NEW YORK GENERAL TERM, September 17, 1860. *Sutherland, Allen and Bonney*, Justices.]

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GRINNELL vs. STEWART and others.

The law will not authorize or justify a complaint against a debtor, and his arrest by the creditor, on the ground of false representations made by the accused on obtaining goods from the prosecutor, when positive evidence of the truth of such representations was furnished, or referred to, by the accused, at the time of making the representations, and it was the creditor's own fault that he did not avail himself of such evidence.

Thus, where G. on applying to S. for goods, on credit, represented that he was worth \$20,000 over and above his debts and liabilities, and that his property consisted of certain specified real estate, and he referred to the records in Queens county clerk's office for the evidence of his ownership, which representations were true, and his ownership did appear by the records in such

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clerk's office; *Held* that these facts showed a want of probable cause for instituting criminal proceedings by S. against G. for obtaining the goods by fraudulent representations; notwithstanding it appeared that S. on a search made by him in the clerk's office, with the aid of the clerk, before instituting the criminal proceedings, had failed to discover the evidence of G.'s title. *Held, also*, that, in an action by G. for malicious prosecution, there being sufficient proof of a want of probable cause, malice might be inferred; and that whether or not the criminal prosecution was malicious should have been submitted to the jury.

THIS was an appeal from a judgment rendered at special term, dismissing the complaint in an action for malicious prosecution and for false imprisonment. It was tried at the New York circuit before Justice DAVIS and a jury, October 15th, 1858. The complaint alleged that in 1856 the defendants caused the plaintiff to be arrested on a charge of having obtained certain property, and a contract by false pretenses; that a warrant was issued at Watertown, and sent to the sheriff of New York, who procured the plaintiff to be arrested, on the 24th December, 1856, and taken to Watertown; that he was in the sheriff's custody from that day until the 2d January, 1857, and then gave bail to answer, in the sum of \$2000. The charge was dismissed by the magistrate on the 17th January, 1857. The first three paragraphs of the complaint, state a case of malicious prosecution. The fourth alleges false imprisonment as a second cause of action. The answer of Stewart, after a general denial, sets up that the defendant Stewart was one of the firm of Woodbury, Avery & Co., of which the defendant, Alfred Avery, was also a member. They owned certain property, which the plaintiff wished to purchase on credit. In answer to an inquiry by them, as to his pecuniary circumstances, he stated that he was the owner of one-half of the Fashion race-course on Long Island, which was of the value of \$100,000, subject to a mortgage of \$10,000, and that he was worth \$20,000 or \$30,000 over and above his debts and liabilities. They made the sale on credit, and took his notes—the first of which, [for \$150,] fell due the 13th August, 1856, and not being

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paid they sued him, and on the 17th September, 1856, obtained judgment for \$164.06. An execution was issued to Queen's county, in which the race-course was situated, but returned *nulla bona*. Judgment was obtained on another of the notes, and execution issued and returned in the same manner. Two others of the notes were protested for non-payment. The answer further states, that on the 1st December, 1856, the sheriff informed the attorney of the plaintiffs in the two judgments, that he had made diligent search in Queens county for real and personal property of Grinnell, but could find none; that he particularly examined the records to see if Grinnell had title to any portion of the course, and found he had none after the 23d January, 1856, when "his interest in the property was cut off by a judgment in a suit to foreclose a mortgage, covering the whole of said race-course, and to which suit said Grinnell was a party." After this information, the defendant, Stewart, caused the records to be searched to find out whether Grinnell owned any real estate in Queens county, on the 7th June, 1856, or at any time subsequent. The clerk of the county assisted in the search, and could not discover that he had title to any. On this information, the defendants say they prosecuted the plaintiff in good faith. The defendant, Budd, put in a separate answer to the same effect, justifying himself as "agent" of Woodbury, Avery & Co. in the transaction. The defendant Avery rested on a general denial.

At the trial, the plaintiff proved a perfect title to half the Fashion course. The deed, with accompanying map, was recorded February 5th, 1855. The title was examined by Judge Brady, who paid \$26,800 for the plaintiff, as the consideration for the purchase. The plaintiff showed that the foreclosure suit in which the defendants allege they supposed Grinnell's interest was sold out, was one by the proceedings in which his share in the fashion course was *exempted*, and it *never had been sold*. The complaint was dismissed, and the plaintiff appealed from the judgment.

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R. D. Holmes and J. T. Brady, for the appellant.

Mullen & Merwin and F. E. Mather, for the defendant.

By the Court, BONNEY, J. This is an action for malicious prosecution and false imprisonment. At the trial, after the testimony was closed, the presiding justice dismissed the complaint, on motion of the defendants' counsel, on the grounds, 1. That malice was not shown, on the part of the defendants or either of them, in instituting the proceedings complained of. 2. That the plaintiff had not shown want of probable cause for instituting said proceedings. 3. That the detention of the plaintiff while held under the warrant issued in said proceedings, did not amount to false imprisonment.

The proof at the trial was, that on the 16th of December, 1856, a warrant for the arrest of the plaintiff was issued by the county judge of Jefferson county, on the complaint and affidavits of the defendants Stewart and Budd, stating in substance that in June, 1856, the plaintiffs obtained from them, or their firm in New York, certain property, by falsely and fraudulently representing that he was worth \$20,000 over and above all his debts and liabilities, and that his property consisted in the one half of the Fashion race-course on Long Island, of which he was owner; that he referred to the records in Queens county clerk's office for evidence of such his ownership; that the representations were false, and the plaintiff owned no such property; that on the 5th December, 1856, Budd made personal examination of the records in said clerk's office, and found that the race-course was sold, under foreclosure proceedings, on the 23d January, 1856, to Reuben Parsons, and it did not appear that the plaintiff, after that time, was owner of such race-course, or any part of it.

Under this warrant the plaintiff was arrested on the 24th December, 1856, in the city of New York, and there detained in custody, until in January following, when he was taken by an officer to Jefferson county, and the hearing of the com-

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plaint was commenced before the county judge, on the 6th, and continued until the 17th January, 1857, when he was discharged and the complaint was dismissed.

When the arrest was made, Avery and Stewart were present, and told the officer who had the warrant that they could not arrange matters, and he must take the plaintiff prisoner. They said the plaintiff had made false pretenses to them that he was owner of property on Long Island, and they had searched the records and could not find it. The plaintiff then insisted that he did own the property, and had not deceived them. Stewart and Avery said they would receive \$3000, or thereabouts, and release the plaintiff, and they did not wish the officer to take him directly to Jefferson county, because they wanted to give him an opportunity to settle. And they further said, if the plaintiff had not money his friends had, and he could get it.

On the trial it was fully proved that all the representations made by the plaintiff in relation to his ownership of one half of the Fashion race-course were true; that his ownership did appear by the records in Queens county clerk's office; that he acquired title by purchase at a foreclosure sale in January, 1855, and paid \$26,800 in cash for the property; that his deed was recorded in said clerk's office on the 25th February, 1855, and duly indexed; and that the judgment record in that foreclosure suit was in the same clerk's office. It was also proved that on the examination before said county judge, the defendant Budd testified that in December, 1856, he went to Queens county clerk's office, and with the assistance of the clerk, found that the plaintiff had no title to any property in that county since 23d January, 1856, when said race-course was sold on foreclosure of a mortgage, and purchased by Reuben Parsons; that he made a thorough search; that the deed to Parsons and a mortgage made by him immediately after his purchase, to a man named Hearne, corresponded in the description of the premises, which were described by courses and distances; that the clerk showed him the papers, among

which he saw the report of the referee and the record of the deed to Parsons, and an entry in the book of notices of *lis pendens*.

The complaint, notice of *lis pendens*, and judgment in such foreclosure suit, and the referee's deed to Parsons under said judgment, and his report of the sale, were then put in evidence, in and by each of which it distinctly appeared that the premises so conveyed to the plaintiff by the deed recorded in February, 1855, and of which he represented himself to be the owner, were not included in the sale made to Parsons, but were expressly excepted from such foreclosure proceedings and sale, by description in nearly (if not exactly) the words of the description in said deed to the plaintiff.

By such proof the plaintiff, in my opinion, did show want of probable cause for instituting said proceedings by the defendants against him for alleged fraudulent representations. He fully and clearly proved that the representations made by him were true to every intent, and that the records to which he referred the defendants distinctly proved them to be true.

But it is said that one of the defendants, with the assistance of the county clerk, examined the records, and failed to find therein the evidence of the truth of the plaintiff's representations; and that in instituting the criminal proceedings against the plaintiff, he and the other defendants acted in the conscientious (though erroneous) belief that the representations made by the plaintiff were false, and that therefore an action for malicious prosecution cannot be maintained against them. And cases are cited for the principle that proof, however positive, of the innocence of a party accused and arrested, is not sufficient evidence of want of probable cause for making complaint against him, to sustain an action for malicious prosecution, against the prosecutor, when he appears to have acted in good faith, and in the belief that his charge was true. (*Murray v. Long*, 1 Wend. 140. *Foshay v. Ferguson*, 2 Denio, 617. *Vanderbilt v. Mathis*, 5 Duer, 304, and cases there referred to.)

Grinnell v. Stewart.

The principle for which the defendants contend is not questioned, but in my opinion it does not reach this case. The principal if not the only ground for the complaint made against this plaintiff was, that the records to which he referred as proof of the truth of his representations were found, on examination, not to contain such proof, but to prove the reverse of what the plaintiff had asserted. The fact was, that the records referred to, and which one of the defendants testified that he examined, did clearly and distinctly prove exactly what the plaintiff had stated. And the defendant who testified in relation thereto, either did not see those records, or did not examine them with reasonable or indeed with any care, or he had not capacity to understand a plain statement of facts; and I do not understand that the law will authorize and justify a complaint and arrest for felony on the ground of false representations by the accused, when positive evidence of the truth of his representations was furnished by him to the complainants when the representations were made.

If, as I think, there was in this case sufficient proof of want of probable cause, malice might be therefrom inferred; and whether or not the prosecution complained of was malicious should have been submitted to the jury. By *malice*, I understand in cases like the present to be intended not necessarily spite or hatred against the accused, but *wrong-mindedness*—*malus animus*—the being actuated by improper and indirect motives; and, in my opinion, upon the evidence in this case, it might very properly have been submitted to the jury to find whether these defendants, in causing the prosecution and arrest of the plaintiff, were actuated by any regard for public justice, or desire that a supposed offender against law and morals should be punished, or intended to use this form of criminal proceeding for their private benefit, to coerce from the plaintiff or his friends payment of the sum of \$3000, which the defendants claimed was due to them from the plaintiff, and upon receipt of which it was proved they, or some of them, said they would release him.

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The opinions above expressed render it unnecessary for me now to consider the question of false imprisonment, the decision of which, as I view the case, will depend very much if not entirely on the determination of the other questions in the action.

The order dismissing the complaint should be set aside and a new trial granted; costs to abide the event of the action.

[NEW YORK GENERAL TERM, September 17, 1860. *Sutherland, Allen and Bonney*, Justices.]

HAWKINS vs. AVERY, impleaded &c.

A defendant, on a trial before a referee, cannot urge, as an objection to proceeding to trial, that other persons who are necessary parties defendants have not been served with process.

That objection relates solely to the regularity of the reference, and makes no part of the trial, and is not therefore the subject of an exception.

If the action is not in readiness for trial it is not referable; and the objection should be taken on the motion to refer.

Such an objection is, in substance, for the want of parties; and that objection must be taken by answer or demurrer.

A power of attorney authorizing the attorney to arbitrate, purchase, sell, dispose of, compromise or otherwise settle, any claim or claims against a vessel, her freight and cargo, for salvage services rendered to such vessel and cargo, will not authorize the attorney, after realizing the salvage claim, to make a disposal of the proceeds among those interested, in such manner and proportion as he sees fit, and to allow such charges against the fund as he pleases.

The authority given by such an instrument is to enable the attorney to deal with the owners or claimants of the vessel and her freight and cargo, and to recover, for the benefit of all, a proper compensation for salvage services. When the fund is received, the agency ceases.

Where the saving vessel is put at risk it is right that its owners should receive a portion of the salvage proportionate to the risk. But where one of the salvors is the owner of a boat which is used only as a means to enable the salvors to reach the derelict vessel, he is fully compensated by receiving the value of his boat. He is not entitled to a share of the net salvage, as the owner of such boat.

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THE plaintiff brought this action to recover of the defendant Avery his share or proportion of a sum of money received by him for salvage of the bark *Delegate*. The other salvors were made parties defendants, but were not served with process. It was found that the plaintiff and defendants were salvors of the bark named, and that the defendant Avery received for himself and the other parties, as and for salvage, the sum of sixteen hundred dollars, and that the expenses properly chargeable to the fund, including a proper allowance agreed upon by the parties for the services of Avery, were eight hundred and forty-two dollars and fifty-nine cents. There were six salvors, and on going to the bark which, when descried, was adrift on Long Island Sound, abandoned by the crew, they made use of a whale boat worth about thirty-five dollars, owned by Hart and Wilson, two of the salvors and defendants in the action. Upon the coming together of the parties for a settlement, the owners of the whale boat claimed for it an equal seventh part of the net salvage. The whale boat was stove after the parties had, by its means, boarded the bark, and while it was being towed behind the bark into port. The plaintiff refused to allow such claim, and forbade the payment of the same by the defendants, and claimed and demanded one equal sixth part of the net salvage, which the defendant refused to pay. The defendant afterwards settled with the other salvors, and paid the owners of the whale boat their claim, and tendered to the plaintiff one seventh of the salvage moneys, but the money was not brought into court, and it was tendered in full satisfaction of the claim. The cause was tried by a sole referee, who reported in favor of the plaintiff, and that the boat was not entitled to the share of one man, but that the owners were entitled to be paid its fair value at the time of its loss; that such value should be included with the other expenses, making, with this addition, eight hundred and seventy-seven dollars and seventy-five cents; that the plaintiff was entitled to recover one sixth of

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the remainder, for which with interest judgment was given. And from that judgment the defendant Avery appealed.

C. C. Egan, for the appellant.

R. H. Huntly, for the respondents.

By the Court, ALLEN, J. If Avery had not settled with and paid the other defendants and taken from them an acquittance, they would have been proper parties to the action. But the payment and discharge alleged in the complaint and admitted by the answer, dispensed with the necessity of bringing them into court by the service of process, as their rights could not be affected by any judgment to be given. The claim of the plaintiff was upon Avery, who had received the money to the plaintiff's use, and if he had paid it to his co-defendants he had done so in his own wrong, and with full notice of the plaintiff's rights. It was not the case of a joint liability or indebtedness. Avery alone was liable, and as the other parties, having released their claim, had no interest in the amount which should be adjudged to the plaintiff, they were properly omitted as defendants, and the action carried on against the defendant Avery. (*Code*, § 136.) But a perfect answer to the objection taken by the defendant to proceeding to trial before the referee until the other parties were served with process, is that the objection related solely to the regularity of the reference, and made no part of the trial, and is not therefore the subject of an exception. If the action was not in readiness for trial it was not referable. (*Code*, §§ 270, 271.) And the objection should have been taken on the motion to refer. The court then adjudged, if the parties did not concede, that the cause was at issue and in a condition to be tried, and the referee, who was only charged with the trial of the issues, could not overrule the action and decision of the court under whose appointment he acted.

Another answer is, that the objection is in substance for

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the want of parties, and this must be taken by answer or demurrer. (*Code*, §§ 144, 147, 148.) Most of the points urged by the defendant's counsel are not based upon any proper exception taken upon the trial, or to the final report of the referee. It was not objected upon the trial that the defendant was not in default before suit brought. But had the objection been taken, the defendant's own evidence would have furnished the answer, showing, as it did, that he pointedly refused to recognize the claim of the plaintiff to any amount beyond the one seventh, and that he refused to pay that sum except on condition that it should be received in full satisfaction.

The motion for a nonsuit was urged upon the vague ground, "that the complaint was not sustained by the proof." The defect in the proof was not pointed out to the referee, or to the court upon the argument of this appeal. The complaint alleged, in substance, that a sum of money had been received by the defendant to and for the use of the plaintiff and certain others, and that all the persons entitled had received their share or proportion, except the plaintiff, and that the defendant refused to pay the amount due to the plaintiff, and the proof substantially conformed to the allegations of the complaint. Another point urged upon the appeal, which was not taken before the referee, or passed upon by him, is that the defendant Avery, under a power given to him by the other parties in interest, "to libel, arbitrate, purchase, sell, dispose of, compromise or otherwise settle, any and all claim or claims, in law or equity, against the bark Delegate, her freight and cargo, for salvage services rendered to said vessel and cargo," had authority, after realizing the salvage claim, to make a disposal of the proceeds among those interested, in such manner and proportion as he saw fit, and to allow such charges against the fund as he pleased. The bare statement of the proposition shows its absurdity. The authority was to enable the attorney to deal with the owners or claimants of the said vessel and her freight and

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cargo, and recover for the benefit of all a proper compensation for salvage services. When the fund was received the agency ceased ; and in no case could an agency created to facilitate dealings with third persons operate upon the rights and dealings of principal and agent. So the agency of a partner or tenant in common of a fund, so far as any agency exists, only relates to dealings with third persons. The rights of the partners or tenants in common, as between themselves, are not affected by any agency implied from the relation they bear to each other. The settlement of the claim for the whale boat by allowing to two of the salvors, its owners, a sum equal to that received by an individual salvor was not authorized by the letter of attorney, or by any implied agency resulting from the relation of the parties. That five of six partners can, against the remonstrance of the sixth, divide the partnership funds among themselves and their sixth partner in such proportion as they please, under any pretext, cannot be tolerated. It would be a novel application of the doctrine of implied agency.

The referee, under objection by the defendant, admitted evidence of the purchase of the boat by Wilson and Hart, and the circumstances of the purchase. The evidence was objected to as immaterial. It was not immaterial, in view of the claim which was made and which had been consented to by the defendant in behalf of Wilson and Hart claiming to own it. The title to the boat was in issue as the foundation of the claim. If the value of the boat was to be allowed, then the price paid for it just before might aid the referee in arriving at its value. The evidence could not work an injury to the defendant. Upon this objection an argument was based, not founded upon any distinct objection taken upon the reference, that the state court had no jurisdiction to determine or apportion salvage. As a maritime demand *in rem* it may be conceded that state courts cannot enforce a claim for salvage against a vessel or cargo ; and whether they have jurisdiction in an action *in personam* to ascertain and determine the

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rights of salvors, as against persons liable for salvage, need not be determined. That courts of common law may have jurisdiction in respect to salvage, and may even determine the validity of a lien for salvage, and the extent of such lien, is beyond a question. (*Baker v. Hoag*, 3 *Seld.* 555. *Cashmere v. De Wolf*, 2 *Sand. S. C. Rep.* 379.) In the case last cited, a suit was entertained to recover property claimed to be held for a salvage lien. *Sturgis v. Law*, (3 *id.* 451,) recognizes the same principle.

But this was an action for money had and received, and it mattered not from what source or upon what consideration the money was received. The action was necessarily a common law action, and admiralty had no jurisdiction in the premises.

There was no foundation in principle or upon authority for the claim of Wilson and Hart to be allowed beyond the value of the boat which was lost, and that amount was allowed by the referee. Salvage, when distributed and apportioned by a court of admiralty by which it is adjusted and allowed, is distributed among the owners, officers and crew of the saving ship, in the discretion of the court and according to the circumstances of each case. (*Mason v. The Blaireau*, 2 *Mason*, 240. *Clayton v. The Harmony*, 1 *Peters' Adm.* 70. *Bell v. The Sloop Ann*, 2 *id.* 279.) Where the saving vessel is put at risk, it is right that its owners should receive a portion of the salvage proportionate to the risk. But where one of the salvors is the owner of a boat which is used only as a means to enable the salvors to reach the derelict vessel, he is fully compensated by receiving the full value of his boat.

The tender was insufficient in amount, and was not brought into court; and as it was only tendered on condition of its acceptance in full compensation of the claim, it constituted no bar to the action. The defendant wrongfully withheld the money from the plaintiff, and was therefore properly charged with interest. Costs followed of course, as it was an

Woodruff v. Hurson.

action for money had and received, and if they were in the discretion of the court that discretion was properly exercised.

There was no necessity for an order for a severance of the parties. The defendant Avery was solely responsible, and judgment could have been given in no other form. (*Code*, § 136.)

The judgment must be affirmed with costs.

[NEW YORK GENERAL TERM, September 17, 1860. *Sutherland, Allen and Bonney*, Justices.]

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WOODRUFF vs. HURSON and others.

To constitute usury, there must be an unlawful or corrupt intent confessed or proved. The party must intentionally take or reserve, directly or indirectly, as interest or as a compensation for giving time of payment, more than at the rate of seven per cent per annum.

Two things must concur: 1. A giving of time, and 2. A reservation of more than seven per cent as a consideration for such forbearance.

A taking or receiving more than the legal interest, by mistake, or for any consideration other than the forbearance, unless it be merely colorable and with intent to cover up usury, will not render a transaction void as being in violation of the statute regulating the interest of money.

The giving of a sum of money by the debtor, to the creditor, or the including of an amount in addition to the actual indebtedness in a security given for the real debt, as a gift, will not bring the security within the statute against usury.

Although the making of a nominal gift is, in general, a suspicious circumstance, yet when it is clearly established that it is in truth a gift, voluntarily made, having no connection with the time given for the payment of the debt, the security will be valid, whatever may have been the moving cause of the gift, with the donor.

If the donee or creditor be innocent of any intent to exact or receive more than the legal rate of interest, his security will be valid.

A motion to amend an answer, so as to authorize certain evidence to be given, if within the jurisdiction of a referee to grant, is addressed to his discretion, and from his decision no appeal will lie.

The denial of such a motion is not the subject of an exception, which only lies to some ruling or decision upon, and in the progress of, the trial:

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Where the amendment proposed to be made, in an answer, contemplates a new defense, *pro tanto*, a referee has no jurisdiction over the motion, and the amendment, if granted, would be irregular.

An attorney, employed by a mortgagee to draw a bond and mortgage, and who acts for him at the execution and delivery of the instruments, not being employed by the mortgagor in the capacity of attorney, counsellor or negotiator in regard to the bond and mortgage, is a competent witness to prove the consideration of the mortgage, and what transpired between the parties, and between himself and the mortgagor, upon the occasion of giving the mortgage; facts thus coming to his knowledge not being privileged communications, within the rule on that subject.

The attorney is a competent witness to prove the negotiation and agreement between the parties; or between the mortgagor and himself as the attorney and agent of the mortgagee.

THE plaintiff brought this action to foreclose a mortgage executed by John Hurson and wife, dated October 16th 1855, to secure the payment of \$21,537 on the 16th day of October, 1865, with interest semi-annually. The defense was usury. The cause was referred to W. H. Leonard, Esq. by whom it was tried. On the trial evidence was given of an indebtedness from the mortgagor to the plaintiff, at the date of the mortgage, for money lent. There was some conflict of evidence as to the actual amount, but the referee found the amount to be \$16,537.45. The defendant gave evidence tending to show that \$5000 was included in the mortgage as a consideration for extending the time of credit for the ten years, while the evidence on the part of the plaintiff was that time was given without any consideration, and that the \$5000 was inserted in the mortgage by the defendant without the knowledge of the plaintiff, and as a gift voluntarily made by the defendant. The referee found in accordance with this version of the transaction, and held the mortgage a valid security for the amount actually loaned, and gave judgment accordingly. Various questions were made upon the trial, which, so far as reviewed upon this appeal, are noticed in the opinion. The defendants appealed from the judgment entered upon the report of the referee,

Woodruff v. Hurson.

H. Brewster, for the appellants.

L. R. Marsh, for the respondent.

By the Court, ALLEN, J. The question of usury was one of fact, and unless the determination of the referee was clearly against the weight of evidence it ought not to be disturbed by us. With the witnesses before him, and with all the aid which an oral examination of them gave him, he was in a much better situation to pass upon their relative credibility and the value of their testimony than we can be from a mere transcript of their testimony. If the transaction was as related by Dusenbury, there was clearly no usury. The loan had been made, and the security and time and terms of payment agreed upon, without any suggestion of any compensation or payment beyond interest at seven per cent. Usury consists in the taking or receiving a greater sum or value for the loan or forbearance of money &c. than is prescribed by law, and contracts and securities are only void for usury when there is reserved or taken, or secured or agreed to be taken, any greater sum &c. for the loan or forbearance of money &c. than is prescribed by statute. (1 R. S. 772, §§ 1-5. *Laws of 1837, Ch. 430, § 1.*) To constitute usury there must be an unlawful or corrupt intent confessed or proved. (*Nourse v. Prime*, 7 John. Ch. 69.) The party must intentionally take or reserve, directly or indirectly, as interest or as a compensation for giving time of payment, more than at the rate of seven per cent per annum. Two things must concur: 1st, a giving of time, and 2d, a reservation of more than seven per cent as a consideration for such forbearance. A taking or receiving more than the legal interest by mistake, or for any consideration other than the forbearance, unless it be merely colorable, and with intent to cover up usury, will not render a transaction void as in violation of the statute regulating the interest of money. If a person deliberately adopt a mode of computing interest which will give more than the legal rate of interest, he will be held to have intend-

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ed the legal consequences of his acts, and his security will be void. But if he take or reserve an excess of interest from a mistake in computing upon a principle correct in itself, the security will not be void. (*Bank of Utica v. Wager*, 2 Cowen, 712, 8 *id.* 398. *New York Firemen Ins. Co. v. Sturges*, 2 *id.* 664. *Same v. Ely*, *Id.* 678. *Archibald v. Thomas*, 3 Cowen, 284.) The giving of a sum of money by the debtor to the creditor, or the including of an amount in addition to the actual indebtedness in a security given for the real debt, as a gift, will not bring the security within the statute against usury. It is true, in most cases it would be a suspicious circumstance, and it would devolve on the court, before upholding the security, to be satisfied that such was the real nature of the transaction; that the nominal gift was not in reality a compensation for the forbearance and so colorable and a shift to evade the statute. But when it is clearly established that it is in truth a gift voluntarily made, having no connection with the time given for the payment of the debt, the security will be valid, no matter what may have been the moving cause of the gift with the donor. If the donee or creditor be innocent of any intent to exact or receive more than the legal rate of interest, his security will be valid. In the case at bar, if the referee had found the transaction usurious we probably could not have interfered with his judgment. But I am better satisfied with the finding as it is than I should have been with a different result. The confessions and declarations of the plaintiff, even admitting that they have been remembered and reported with a verbal accuracy which is necessary in this particular case to entitle them to any force whatever, and which cannot be certainly known, are entitled to but little weight. The plaintiff is shown to be an intemperate, rash and inconsiderate man, and the expressions were made under the excitement of passion, and should be received with much allowance. Under all the circumstances of this case, and in view of the fact that a very slight change in the mode of expression would entirely

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vary its effect as an admission, but little reliance ought to be placed on these declarations. The testimony of the defendant who alone proved the usury is not entirely satisfactory, and his appearance as a witness and as presented by the record of his evidence, is not such as to place him above suspicion. He was contradicted by Mr. Dusenbury in several important particulars, and, so far as can be determined from the case, the referee was discreet in giving credit to Dusenbury and holding the usury not proven, and that the five thousand dollars was included in the mortgage at the suggestion and request of the mortgagor without the knowledge of the mortgagee, as a donation. Whether the mortgagor had any ulterior object, and designed to lay the foundation for this defense, is not known. But it is sufficient to uphold the security that the sum was included at his request, and professedly as a gift, and was accepted by the plaintiff and his agent as a gift, and not as a cover for usury. Neither the intent or design to take usury, nor the agreement to pay usury, was established by the evidence.

In the course of the trial the defendant offered in evidence three notes of the plaintiff, payable to the order of the mortgagor, by way of set-off, and to reduce the amount due upon the mortgage. The defendants had alleged in their answer a payment of eight hundred dollars, which was admitted by the plaintiff, and no other set-off or payment or counterclaim was set up. The referee properly excluded the evidence, as not within the issue, or authorized by the answer. The motion to amend the answer of the defendants so as to authorize the evidence to be given, if within the jurisdiction of the referee to grant, was addressed to his discretion, and from his decision no appeal will lie. The denial of the motion was not the subject of an exception, which only lies to some ruling or decision upon and in the progress of the trial. Because a motion chances to be made while the trial is proceeding, and before the same judge, it does not for that reason make a part of the trial. But the amendment contemplated

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a new defense *pro tanto*, and to the extent proposed would have changed the defense, and the referee, therefore, had not jurisdiction over the motion, and an amendment, as asked, by direction of the referee, would have been irregular. (*Union Bank v. Mott*, 19 How. 267. 18 *id.* 506, *per Gray, J.* *Everett v. Vendryes*, 19 N. Y. Rep. 439.)

Upon the trial the attorney by whom the bond and mortgage were drawn, and who in the transaction acted for the plaintiff, was examined as a witness and gave evidence of what transpired between the parties, and between himself and the mortgagor, upon the occasion of giving the mortgage. The defendants objected, upon the ground that the relation of counsel and client existed between the witness and the defendant, and that the former was not therefore permitted to disclose what took place at the interviews spoken of by the witness. The witness testified that he was not employed by the defendant in the capacity of attorney, counsellor or negotiator, in regard to the bond and mortgage in suit, and that the mortgagor had no legal counsel present at any of the interviews. It also appeared that the witness had been employed by the mortgagor to negotiate another loan upon the same premises, and had done so, and searched the title and perfected the security, for which he was to receive a specific sum, which sum was paid by the mortgagor. This was the only evidence of any professional relation of the witness to the mortgagor. The witness testified to the consideration of the mortgage, and the acts of the parties, rather than to any declarations or communications of the mortgagor to him.

The rule is well settled that communications to an attorney in the course of any professional employment, relating to the subject of the employment, and which may be supposed to have been drawn out in consequence of the relation in which the parties stand to each other, are under the seal of confidence, and entitled to protection as privileged communications. (*Bank of Utica v. Mersereau*, 3 Barb. Ch. 595.

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Williams v. Fitch, 18 *N. Y. Rep.* 546.) Within this rule the communications proved upon this trial were not privileged. The only act in which it can be claimed that the witness in any sense acted as the attorney or adviser of the mortgagor, was in drawing the bond and mortgage, and the communications were not made to enable the witness to prepare the securities. They were admissions and declarations as to the claim of the plaintiff, made to the witness when acting as the attorney for the plaintiff, and presenting the demand for payment, or made to the plaintiff in the presence of the witness and in the process of stating the amount due to the plaintiff, and cannot be supposed to have been drawn out in consequence of any confidential relation between the parties. An attorney employed by vendor and purchaser, or employed by one and paid by both in equal moieties, will not be permitted to disclose the communications of either, made to him to enable him to prepare the deed, or to produce the draft of the deed in evidence without the consent of both. (2 *Adol. & Ellis*, 171.) Neither will an attorney be permitted to produce in evidence against his client or without his consent, an abstract of title furnished him to enable him to raise money. (*Doe v. Watkins*, 4 *Scott*, 155; *S. C.* 3 *Bing. N. C.* 421.) But this case is not within the principle of those and similar cases. It is rather the proving of a communication from the mortgagor to the plaintiff, which cannot be within the privilege claimed. A witness may be called upon by the plaintiff to state a conversation in which the defendant proposed a compromise to the plaintiff, although the witness attended on that occasion as attorney for the defendant. (*Griffith v. Davies*, 5 *B. & Ad.* 502.) The attorney was a competent witness to prove the negotiation and agreement between the parties or between the mortgagor and himself as the attorney and agent of the plaintiff.

The exception of the defendants to the rulings of the referee admitting evidence of the agency of the plaintiff in procuring another advantageous loan to the defendant is not

Vail v. Jersey Little Falls Manufacturing Company.

well taken. That evidence was competent to show his friendly relations with the mortgagor and to counteract the effect of the evidence of threats to injure and ruin the latter. So far as such threats had a tendency to show a design to oppress the mortgagor, friendly acts showing the absence of such design were competent. So, too, the evidence of the plaintiff's habits might have been competent to enable the referee to determine what stress should be laid upon the declaration of the plaintiff of a boasting or threatening character. But such evidence was only given to account for the absence of the plaintiff from the trial, to the end that no argument in favor of the truth of the defendants' allegations could be derived from the omission of the plaintiff to contradict them by his oath. For this purpose the evidence was competent. The judgment of the referee must be affirmed with costs.

[NEW YORK GENERAL TERM, September 17, 1860. *Sutherland, Bonney and Allen*, Justices.]

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VAIL *vs.* THE JERSEY LITTLE FALLS MANUFACTURING
COMPANY.

Where, under a contract of hiring for a specified period, at a fixed salary, the person employed continues to render services beyond that period, he will be entitled to compensation at the same rate, for the additional time.

A continuance in the employment of the hirer, with the consent of the latter, after the expiration of the time specified in the agreement, is equivalent to a new hiring upon the same terms.

The fact that the employer does not continue to carry on his business during a portion of the time, and that during that interval there is nothing for the employee to do, in one of the capacities in which he is employed, will not affect the construction of the contract, or the liabilities of the parties.

THE plaintiff sued to recover a balance claimed to be due to him for services rendered to the defendants as their secretary and shipping agent, from January 9th to May 15th,

32	564
125a	130
33	564
76h	179
32	564
87h	388

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1858. It was in proof, that the plaintiff acted as the defendants' secretary during that period; and the question in dispute was, whether these services were rendered under a contract, whereby the defendants had agreed to pay therefor at the rate of \$1200 per annum. The defendants were engaged in quarrying stone, at Newark, N. J., and in the spring (April 9th) of 1857, hired the plaintiff to act as their "shipping agent," for the "season," (of "quarrying and transportation;") and agreed to pay him at the rate of \$1200 per year salary. On the 24th November, the defendants' directors passed the following resolution: "On motion of T. E. Hastings, Orsamus M. Vail was unanimously elected to the office of secretary of this company, for the balance of the current year, with the understanding that he is to act as the secretary and shipping agent of the company, at Newark, at the rate of salary of twelve hundred dollars per annum, being the same rate of salary heretofore stipulated to pay said Vail for his services, as agent for this company, at Newark." The "current year" expired January 10th, 1858, and the plaintiff was paid, at the rate of \$1200 per year, up to that date. The action was tried before Justice DAVIS, without a jury. The court held that the plaintiff, having continued to act as secretary of the company after the expiration of the "current" year, and his services having been accepted by the company, in the absence of any particular arrangement subsequent to the resolution of November 24th, was entitled to recover at the rate of salary fixed by the resolution, until the period when he ceased to act as such secretary, May 15th, 1858, and thereupon gave judgment for the plaintiff for four hundred and thirty-five dollars and nine cents, being at the rate of twelve hundred dollars per year, for the period from January 9th to May 15th, 1858, with interest from the latter date. From this judgment the defendants appealed.

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H. M. Hyde, for the appellant.

J. N. Lake, for the respondent.

By the Court, ALLEN, J. This case is not properly before us. Having been tried by the court without a jury, the case should have contained a separate statement of the facts found by the justice, and his conclusions of law. (*Code*, § 268.) The case contains no such statement.

But if this defect be overlooked, it will be seen that upon the merits the case is with the plaintiff. The only question is upon the construction and effect to be given to the contract of hiring, as expressed in the resolution of the defendants' directors of the 24th November, 1857. This resolution, and the acceptance of the office and employment under it, constitutes the contract between the parties from that time. In the spring, and about April, 1857, the plaintiff was employed as shipping agent of the defendants at the *yearly* salary of \$1200. Although the compensation was in the form of a yearly salary, &c. the hiring might perhaps be held to be a hiring by the year, though the actual duties of the shipping agent as such were necessarily and by their nature confined in the main to the season of navigation, and in the winter of 1857-8, actually terminated about 1st January, 1858. In Nov. 1857, and while the plaintiff was acting as shipping agent, the office of secretary of the defendants became vacant, and by resolution of the directors the plaintiff was appointed to the office "for the balance of the current year, with the understanding that he is to act as secretary and shipping agent of the company at Newark, at the rate of salary of \$1200 per annum, being the same rate of salary heretofore stipulated to pay said Vail for his services as agent for this company at Newark." The current business year of the company expired on the 10th of January, 1858, at which time a new board of directors should have been chosen, but the election did not take place till February 24th, and the plaintiff continued to

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act as secretary until the 15th of May. There is no proof of any service as shipping agent after January, 1858. The fact that for a part of the year there was nothing to be done by the plaintiff in one of the capacities in which he was employed by the defendant cannot vary the effect of the contract as made by the parties. So long as he performed the duties pertaining to his situation, at all times, so far as there were duties to be performed, and held himself ready to render all the services required of him in the proper season for their performance, the plaintiff has a right to insist upon a performance by the defendant. The year of his employment as shipping agent, if it were a hiring by the year, expired in April. And if it were a hiring so long as any thing was to be done as shipping agent in 1857, or to close up the business of that year, it terminated in January, 1858. But the employment of the secretary, although for the "current year," and for the reason that the board of directors could not appoint a secretary for a longer period, was at a fixed salary, and if the services continued beyond that year they were at the same rate. A continuance in the employment with the consent of the defendants after the expiration of the "current year," was equivalent to a new hiring upon the same terms. (*Evertson v. Sawyer*, 2 *Wend.* 507. *Bradley v. Covel*, 4 *Cowen*, 349.) It would be fair to presume from the language of the resolution and the acts of the parties that it was expected to resume the quarrying and shipping stone in the spring of 1858, and that the plaintiff would continue to act as secretary and shipping agent on and after November, 1857, and up to January, 1858; and had that been the case the plaintiff would not have been heard upon a claim beyond the salary of \$1200, no matter what might have been the actual value of his services. The fact that the defendant did not continue its business cannot affect the construction of the contract, or the liabilities of the parties. The plaintiff waited till 15th May for the defendant to resume its business, which the year before commenced in April, being daily at the office of the

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company performing the duties of secretary and ready to act as shipping agent, and is entitled to recover after the rate agreed upon.

The judgment should be affirmed.

[NEW YORK GENERAL TERM, September 17, 1860. *Sutherland, Bonney and Allen*, Justices.]

MORRISON vs. THE NEW YORK AND NEW HAVEN RAIL ROAD COMPANY.

A judgment is to be deemed entered by the direction of a single judge when it is entered by the clerk, at the circuit, upon the verdict of a jury, under section 264 of the code, and from such a judgment section 348 authorizes an appeal upon the law to the general term, without any motion having been previously made, at a special term, for a new trial.

Such an appeal brings up the *law* of the case, as presented by exceptions taken on the trial.

To present a question of *fact* upon the evidence, or the right of the unsuccessful party to a new trial, for the reason that the verdict is against evidence, or upon the ground of surprise, or newly discovered evidence, or the like, a motion must be made at a special term, and from the order made thereon, an appeal to the general term lies.

In an action against a rail road company for negligence in running over and killing a horse, where the injury is alleged to have occurred in consequence of a defect in a fence which the defendant was bound to maintain, if there is *any* evidence that the fence was insufficient and defective, and that the defendant's agents knew or had notice of it, and that the horse got upon the track by means of such defect, it is erroneous to nonsuit the plaintiff.

If, in such a case, there is any evidence that the horse got upon the rail road track over or through a fence which the defendant was bound to maintain, it should be submitted to the jury; but not so of evidence that possibly the horse so got upon the track.

If there is no evidence that the horse got upon the track in the manner alleged, the plaintiff should be nonsuited.

APPEAL by the defendant from a judgment given at the circuit, on a trial before Justice BALCOM and a jury. The action was case for negligence, for carelessly and negligently running over and killing a mare of the plaintiff. So much

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of the case as is necessary to an understanding of the questions considered is stated in the opinion.

W. Tracy, for the appellant.

G. Dean, for the respondent.

By the Court, ALLEN, J. The defendant appeals directly from the judgment rendered at the circuit, upon a bill of exceptions annexed to and making a part of the record. It is claimed and objected that a trial by jury can only be reviewed upon a motion for a new trial made in the first instance at a special term, except when ordered to be heard in the first instance at the general term, under the provisions of section 265 of the code of procedure. It was said that a motion for a new trial upon the merits and upon the ground of newly found evidence had been made at special term and granted upon the latter ground and denied upon the other; and that the order granting the new trial, upon appeal by the plaintiff, had been reversed at the general term, leaving the order denying the motion for a new trial upon the merits in force, and the proper subject of consideration upon this appeal. It is a sufficient answer to this suggestion that the record before us does not disclose these proceedings. Upon the case it is an appeal directly from the judgment at the circuit, without any intervening proceedings, and if not authorized by statute must be dismissed. The understanding of the profession has been that an appeal might be taken as has been done in this case, upon which exceptions taken at the trial could be brought before the court at general term, and the practice has been in accordance with this understanding; and in very few cases has a motion been made for a new trial before judgment. Indeed those cases in which the entry of judgment has been stayed to allow a review of the trial have constituted the exceptions to the ordinary practice, and that form of procedure has been resorted to when it has been sup-

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posed there were reasons for making the case an exception, and excusing the unsuccessful party from the costs and trouble of an appeal in the first instance. Section 264 of the code prescribes the procedure upon the coming in of a verdict in a trial by jury, and unless a different direction be given by the court it is made the duty of the clerk to enter a judgment in conformity with the verdict. The only direction of the court at variance with the general directions of the statute, contemplated by this section, is an order reserving the cause for argument or fuller consideration. The same section provides for a motion before the same judge who tries the cause, and to be made at the same term or circuit at which the trial is had, for a new trial on the minutes of the judge. Then follows section 265, making provision for cases "reserved for argument or further consideration" under section 264, other than those in which a motion for a new trial upon the minutes, is entertained by the judge, and it directs all such cases to be heard in the first instance at the circuit or special term, except when exceptions are ordered by the judge to be heard in the first instance in the general term. The same section makes provision for a verdict subject to the opinion of the court at the general term. These sections, so far as they provide for the review of the trial by a motion for a new trial upon a case, exceptions or otherwise, relate to proceedings before judgment and when the entry of the judgment has been stayed by direction of the court, and it is supposed by many good practitioners that the entry of judgment is a complete bar to a motion under these sections. It is not necessary to pass upon this question here. If the sections referred to above provide for and regulate the review of trials at circuit by jury, the objection of the plaintiff is well taken and the appeal must be dismissed. But by section 348, an appeal upon the law may be taken to the general term from a judgment entered upon the report of referees, or the direction of a single judge of the same court, in all cases, and upon the fact when the trial is

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by the court or referees. A judgment is entered by the direction of a single judge when it is entered under section 264, and an appeal brings up the law of the case as presented by exceptions taken in the progress of the trial. To present a question of fact upon the evidence, or the right of the unsuccessful party to a new trial for the reason that the verdict is against evidence, or upon the ground of surprise or newly discovered evidence, or the like, a motion must be made at special term, and from the order made upon such motion an appeal may be taken to the general term. (*Code*, § 349.) If this is not the true construction of the statute, then subdivision 2 of § 349, authorizing an appeal from an order granting or refusing a new trial, which was inserted by an amendment in 1851, was unnecessary, as it was provided for in section 348, giving an appeal from the law of the case when the trial was by jury. The theory of the code was to review the judgments given at special term and circuits only upon a final appeal to the general term; and while some innovations have been made upon this theory by permitting a motion to be made for a new trial whenever the judge before whom the trial is had thinks it a proper case, and stays the entry of the judgment to enable the motion to be made, the other remedy, by appeal at once to the general term from the judgment at circuit, remains.

This is consistent with *Watson v. Scriven*, (7 *How.* 9,) and *Taylor v. Harlow*, (11 *id.* 285.) The justices pronouncing the opinions in these cases carefully distinguish between motions for new trials before judgment and appeals upon the law after judgment. (*See per Harris*, J. 7 *How.* 11.)

The only questions before us are upon the exceptions to the rulings of the judge on the trial. The question upon the sufficiency of the evidence to sustain the verdict is not brought up by the appeal.

The most material exception is to the refusal of the judge to nonsuit the plaintiff at the close of the evidence on his part. The negligence complained of as the cause of the in-

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jury was the neglect of the defendant to build a sufficient fence along the line of the road opposite the pasture in which the mare was kept. The owner of the lot, a farmer, was the bailee of the mare, having received her from the plaintiff to keep for a special purpose, and he was the witness relied upon to prove the defect in the fences, and that by means of such defect the mare escaped from the lot upon the road of the defendant, where she received the injury complained of. The witness was evidently very far from being a reliable witness, and if he was in the main truthful, he was not candid or ingenuous. But it was for the jury to pass upon his credit and the weight to be given to his testimony, and if that was sufficient, if believed, to authorize the jury to find negligence on the part of the defendant, the judge properly denied the motion for a nonsuit and submitted the question to the jury. The duty of the defendants to erect and maintain fences on the sides of their road, of the height and strength of a division fence required by law, with openings, or gates or bars therein, and farm crossings of the road for the use of the proprietors of the land adjoining the rail road, is not controverted. (*Laws of 1850, p. 233, § 44*.) The cattle guards mentioned in the same section are required only at road crossings; that is, at the crossings of a public highway and not at farm crossings. (*Brooks v. New York and Erie Rail Road Co., 13 Barb. 594*.) If there was any evidence that the fence was insufficient and defective, and the defendant's agents knew or had notice of it, and that the mare got onto the road by means of such defect, the exception was not well taken. The description of the fence by the witness is not satisfactory. In his direct examination he mingled a description of another fence with a description of the fence separating the pasture lot from the road, in a way well calculated to mislead, if it was not so intended; and it is not easy to say how much of his evidence relating to the condition of the fence is applicable to the fence in question. The defect in the fence, if there was any, was in its original

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construction, and not by reason of its decay or getting out of repair. It was claimed that it was not of a proper height to turn cattle and horses. But the witness, the owner of the farm and the bailee of the mare, by whom she was put into the pasture and kept there, built the fence under a contract with the defendants. The witness testified as follows: "I built the fence. I told the agent of the company that I did not build it for a sufficient fence. I told him that cattle would get over it. The agent of the rail road company employed me to build the fence, and paid me for it. The company first agreed with me to build the fence and then it agreed with me to build it and paid me for it;" and again, "When I built the stone wall I was limited to one dollar a rod. I said it was not enough. The agent of the company told me to build such a fence as I would be satisfied would keep the cattle off the road." The witness, acting under these instructions, represented to the company when he claimed such pay for building the fence, that it was sufficient for the purpose named, to wit, "to keep the cattle off the road." As against third persons and the public the company would not be excused from answering for any defects or insufficiency of the fence; but as against the builder of the fence his admission, if it did not estop him, would be very high if not conclusive evidence to disprove negligence on the part of the defendant; and the plaintiff is in no better situation to allege negligence against the defendant than his bailee would have been. The same witness would have it understood that cattle and horses had before got over the fence, and that the defendant's agents had notice of it. But the cross-examination gave the evidence an entirely different coloring. Upon the direct examination he said that "horses had got out onto the railroad before, and a cow, and he had told the agent of the defendant of it at different times." On his cross-examination he says, "I never knew or had reason to suppose an animal ever got over the fence along the lot where the mare was." And upon the subject of notice he

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says that he once, on the cars, told the defendant's superintendent that he wanted a better fence, and that he thought the fence insufficient, and he thought it was before the accident, but was not certain. This, with some measurements showing the fence to have been three feet high in some places, and in some places more than that, is the only evidence of insufficiency. There is an entire absence of evidence that any horse or beast had ever got over or broken through it, although it had been built about twelve years, and the defendants had caused it to be built by the party now complaining of it, in performance of a contract made with him to fence his land against the rail road as well as in performance of a duty imposed by law. It is not to be credited that the fence was, when built, an imperfect and insufficient fence for the purpose required, or that the witness would have relinquished the defendants from their contract except upon a full performance, or an equivalent. Upon the evidence there was no proof that the fence was defective or insufficient.

A still more palpable defect in the plaintiff's case was in the want of evidence that the mare escaped onto the road through or over the fence. There was a farm crossing at, and a pair of bars leading into, the pasture lot, with a corresponding pair of bars opposite leading into the lot on which the farm house stood. No marks or breaks were found upon the fence or ground indicating that the mare with another horse that escaped from the pasture at the same time had so escaped by getting over the fence. They were found some distance from the bars, and by their tracks could be traced back to within about a rod of the bars. And there their tracks were not discoverable in the green sward. In other words, they were traced to within a few feet of the bars, and to a point where if they had passed from the pasture lot through the bars they could not have been traced by reason of the character and condition of the turf or sward. The bars were alight, but not broken. The witness before referred to and by whom alone the plaintiff's case is sought to be main-

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tained, says: "I know that the bars to the lot in which the mare was were put up after I crossed the railroad last, and I found them up early in the morning when I first looked." On his cross-examination he testified as follows: "My man, Henry and I, had used the bars the afternoon previous; after we passed through we put them up; afterwards I sent Henry to turn the oxen into the lot through both pairs of bars, but was not with him." Henry was not produced as a witness, and it was said by the witness that he did not know where he was. Upon this evidence the presumption was that the horses had escaped through the bars left open by the hired man when he turned out the oxen; and this presumption is strengthened by the absence of the hired man and the omission to prove the condition of the bars when they were first seen in the morning. At most it was a balanced case, and left it for the jury to guess, or to decide arbitrarily without evidence, whether the horses escaped through the neglect of the defendant to build and maintain a proper fence, or the carelessness of the servant of the bailee in omitting to put up the bars. In the latter case the defendant would not have been liable for the injury to the mare. (*Per Selden, J. in Poler v. New York Central Rail Road Co.* 16 N. Y. Rep. 476. *Brooks v. New York and Erie Rail Road Co.* 13 Barb. 594.) The extent of the evidence was that it was possible the injury might have been the result of a defect in the fence which the defendant was bound to maintain. The plaintiff held the affirmative, and when he rested there was no evidence that the mare got onto the road over the fence or through it, and for that reason the nonsuit should have been ordered. It is undoubtedly true that when there is any evidence of neglect the question must be submitted to the jury. So if there was any evidence that the mare escaped over the fence, it should have been submitted to the jury, but not so of evidence that possibly she might have so escaped. (*See Brooks v. New York and Erie Rail Road Co. supra, approved in Corwin v. New York and Erie Rail*

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Road Co. 3 Kern. 50.) These defects in the case may be supplied upon a new trial, but I think the case should not have been submitted to the jury upon this evidence.

The judgment must be reversed and a new trial granted, costs to abide the event.

[NEW YORK GENERAL TERM, September 17, 1860. *Sutherland, Bonney and Allen*, Justices.]

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 CLARK, executor &c., vs. GILBERT.

G. and three others, his associates, having a contract with the United States government for the construction of a dry dock, in California, with a lease of the same from the government, for the repair of merchant as well as government vessels; and being the owners of a partial right to build a basin and railway to use in connection with such dock; and being also in treaty with the government for a contract to construct the basin and railway; in which enterprises the interest of G. was one fourth part; H., by a contract in writing between him and G., dated Feb. 8, 1853, agreed to go to California and take charge of G.'s interests in those contracts, and of all business connected with them; and G. agreed to pay him, for such services, one third of all the profits that should be paid to G., payment to be made to H. as fast as said profits should be ascertained and derived from the business. G. also agreed to pay the passage of H. out to California, and to pay him a salary of \$1000 a year, &c. The contract also provided for the payment to H., in case G. and his associates should sell their interest in the contracts, &c. of one third of the profits earned by the quarter interest of G. up to the time of sale, and one third of the profits derived from such sale, &c. H. proceeded to California, where he arrived in March, 1853, and was employed by all the associates, first as book-keeper at \$1200 per annum, &c., and then as agent at \$2500 per annum, &c. He continued in the employ of the associates until his death, in July, 1856. The contract for the building of the dock was made in 1851, and the dock was ready for use in November, 1853, and completed in 1855, and taken possession of by the government in November, 1856. The contract for the construction of the basin and railway was made in July, 1854, and the work then commenced, and before the death of H. all the materials for the structure had been collected, and most of the work had been done. The profits on both contracts and the business of docking vessels, were large, but it did not appear that there was a profit, or if any, what profit, on the first contract. G. received for his share of the profits \$84,920.90, the greater part of which was received after the death of H., and upon the basin and railway contract.

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In an action by the executor of H., upon the contract made between H. and G. to recover for the services performed by H. under the same; *Held* that H. was not a partner, nor entitled to the rights of a partner; but the contract was one of hiring and service, and the relation of principal and agent was created by it.

Held also, that the two contracts, and the use of the dock under the lease from the government, were distinct enterprises, not connected with each other, and that the plaintiff was only entitled to recover, 1st. The share agreed upon of the profits in building the dock; 2d. A like share of the profits arising from the use of the dock up to the time of the death of H.; and 3d. What H.'s services were reasonably worth to G. in supervising and looking after his interests in the construction of the basin and railway, which was a service entirely distinct from the service rendered the associates as their book-keeper and agent, and to be compensated in reference to their actual value, and distinct from the compensation received from the associates.

That if the three enterprises could not properly be treated as distinct from each other, in ascertaining the amount due to the plaintiff, then that the plaintiff was entitled to recover the value of the services of H. for the whole time that he was in the employ of the defendant, deducting the payments received by him from the latter, for such services.

Held, also, that as the profits to be earned had not, either at the time of making the contract or at the time when it terminated by the death of H. and the right of action accrued to his representative, any determinable value, or indeed any existence, they could not be resorted to as the measure of the plaintiff's recovery.

Where the performance of a contract for services has been prevented by the sickness or death of the party hired, or other providential interposition, such party, or his personal representative, can only recover what his services are reasonably worth; and if they have been worthless he can recover nothing. The contract price for the completed service does not measure the compensation for the partial and interrupted service.

THE plaintiff, as executor of William A. Heermans, deceased, sued upon a special contract, to recover for services performed by the testator for the defendant in California. The contract was dated February 8, 1853, at which time the defendant and three others, his associates, had a contract with the United States government for the construction of a dry dock at Mare Island in California, with a lease of the same from the government for the repair of merchant as well as government vessels, and were the owners of a partial right to build a basin and railway to use in connection with such dock. They were also in-treaty with the government for a

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contract to construct for the government the basin and railway. The interest or share of the defendant in these enterprises was one fourth part. By the contract in suit the testator agreed to go to California and take charge of the defendant's interests in these contracts, and all business in any manner connected with them. The defendant "for and in consideration of the services well and truly performed of the said Heermans in going to California and taking charge of the one quarter interest of the said Gilbert in the above mentioned contracts, and also of his interest in all other contracts that may be made, or business in any manner connected with said contracts or works," agreed to pay to said Heermans, "his heirs, administrators and assigns, one third of all the profits that may or shall be paid to said Gilbert for the aforesaid business, and to make payment to said Heermans as fast as said profits shall be ascertained and derived, or in any way drawn from the business." The defendant also agreed to pay the passage of the testator out to California, and to pay him a salary of one thousand dollars a year, together with board and washing at Mare Island.

Provision was made in the contract to the effect that if the defendant and his associates should sell the whole or any part of their interest in the contracts, works or business, the said testator should receive one third of the profits earned by the quarter interest of the said Gilbert, up to the time of sale, and one third of the profits that should be derived from such sale, and continue to have one third of the profits earned by the remainder of said quarter after any portion should be sold. The testator proceeded to California in pursuance of the contract and under instructions from the defendant, and after a time was employed by all the associates, first as book-keeper at \$1200 per annum, and afterwards as agent at \$2500 per annum, with board. The testator arrived in California in March, 1853, and remained at his post until April, 1856, when he went to the Sandwich Islands for his health, having been seriously ill for some time before. He returned to California in July, 1856, and died on the 27th day of that

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month. The contract for building the dock was made in 1851, and the dock was ready for use in November, 1853, and fully completed in 1855, and was taken possession of by the government in November, 1856. The contract for the construction of the basin and railway was made in July, 1854, and the work immediately commenced, and before the death of the testator all the materials for the structure had been collected, and most of the work had been done. Fifteen to twenty thousand dollars, only, was then required to complete it, and it was completed and accepted by the government in the fall or early in the winter following. The profits on both contracts and the business of docking vessels were large, but it does not appear that there was a profit, or if any, what profit, on the first contract. The defendant received for his share of the profits \$84,920.90, the greater part of which was received after the death of Heermans, and upon the basin and railway contract. The action was tried by a referee, who gave judgment for the plaintiff for one third of the defendant's share of the profits on the two contracts and the use of the dry docks under the lease, in the proportion which the time while Heermans was employed under his contract with the defendant, before his death, bore to the entire time taken to complete the works after the making of the contract by Heermans and the defendant, and for 41-45ths of the profits. The judgment was for \$28,449.66; and from that judgment the defendant appealed.

S. J. Tilden and Thomas Nelson, for the appellant.

W. Clark, in person, and *Paris G. Clarke*, for the respondent.

By the Court, ALLEN, J. Conceding the measure of damages established by the judgment in this action to be just and correct in principle, the learned referee erred in its application. He treated the two contracts, and the use of the dock under the lease from the government, as a single adventure, while although the same parties were interested in each and to the same extent, there was no manner of connection be-

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tween them, and there was no connection in fact between them. The making of the contract for the dry dock preceded that for the basin and railway by three years, and the former was nearly completed before the latter was undertaken, and the use of the dry dock under the lease commenced, necessarily, after the completion of the structure, and was enjoyed without reference to the basin and railway. If, for the reason that the lease of the dry dock was simultaneous with or a part of the contract for the building of the dock, it should be thought that the contract for building and the use of the dock under the lease should be treated as a single transaction, as between the parties to this suit, the case will not be varied; for then the contract for the basin and railway must stand by itself as an independent transaction. Then upon the rule established by the referee for adjusting and settling the rights of the parties and measuring the damages of the plaintiff, the profits of each enterprise should have been ascertained and the plaintiff would have been entitled to receive, 1st, one-third of the profits upon the defendant's one-fourth of the dry dock contract; 2d, a like proportion of the profits arising from the use of the dock; 3d, a like share of the profits upon the construction of the basin and railway, in the proportion which the time while the testator was employed upon the work bore to the entire time occupied in performing the contract. The whole work occupied about two years, only about twenty months of which had elapsed at the time of the death of the testator, and his proportion would have been about 20-24ths, instead of 41-45ths, as awarded by the referee. Again; there should have been no abatement from the profits arising from the construction of the dock, for its use, by reason of the death of the testator. Those profits had been earned and were easily ascertained, and the plaintiff's testator would have been entitled to them if the basin and railway contract had never been performed, or if there had been a loss after the death of the testator, instead of a profit.

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But the more serious question is as to the right of the plaintiff to resort to the profits of the contract for the construction of the basin and railway, when fully performed, as the measure of his recovery for the services of his testator in and about their construction up to the period of his decease. If it could be established that the testator of the plaintiff by the terms of the contract with the defendant became a partner with him in the work and business, doubtless his representative would be entitled to an account of the partnership business up to the time of his death, and in the absence of any better or more reliable data to ascertain the value of the interest of the deceased partner, the rule adopted by the referee might be allowable. But it is not and cannot be claimed that Heermans was a partner or in any way a tenant in common with the defendant. The contract was one of hiring and service, and the relation of principal and agent was created by it. Heermans was employed as the agent of the defendant to look after and manage his interests in a particular business, and was to receive from his employer a fixed salary, and in addition thereto a portion of the profits of the business. He was not liable for any losses, and could not have been liable to third persons upon the contracts of the associates. He was not therefore a partner, or entitled to the rights of a partner. (*Vanderburgh v. Hull*, 20 *Wend.* 70.) The profits were only referred to as a measure of compensation, and gave the clerk and agent no interest in the capital stock of the concern. (*Burckle v. Eckhart*, 1 *Duer*, 337; *S. C.* 3 *Com.* 132.) The contract was for the personal services of the plaintiff's testator, and could not be performed by substitute, either before or after his death. His death, therefore, put an end to the contract; but as it was not rescinded by the act or default of the testator, but was terminated by the act of God, the servant did not forfeit his right to compensation for the services actually performed under the contract of hiring. And as the defendant is not in fault, he is only liable to pay the fair value of

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the services of which he has had the benefit. Had he discharged the testator without cause, he might have been liable for all that the testator would have made or earned by a full performance of the contract. As it is, the testator having performed services under a contract, the full performance of which is providentially and without the fault of either party prevented, the party performing the services cannot recover upon the contract, for the reason that performance on his part is a condition precedent to a recovery, and he must necessarily resort to a *quantum meruit*. That he has not lost his right to all compensation is well established upon principle as well as by authority. (*Wolfe v. Howes*, 24 Barb. 174; *S. C. 20 N. Y. Rep.* 197.) In the absence of any agreement between the parties, as to price or compensation, the question as to how much the laborer deserves to receive must be determined upon evidence of the nature and value of the services. If a special contract for service has been fully performed by the servant, and the compensation has been fixed by the contract, an action upon the *quantum meruit* may be brought, and the contract will be evidence to regulate the recovery. So in a case like this, where full performance has been prevented by sickness or death, the contract or agreement of the parties is competent evidence, and when the compensation is so fixed and regulated by the contract that it can be apportioned without injustice to either party, the compensation agreed upon may well be taken as that which the party reasonably deserves to receive; as where the wages agreed upon are a specified sum per month or year, and one month or one year is as valuable to the employer as any other month or year, or where the labor is to be compensated by any other known and definite standard, and the amount earned at any given time can be ascertained by measurement or arithmetical calculation. (*Jones v. Judd*, 4 Comst. 411.) But it does not follow that the same or any similar rule can be adopted when the compensation agreed upon is not specific, but uncertain and depending upon con-

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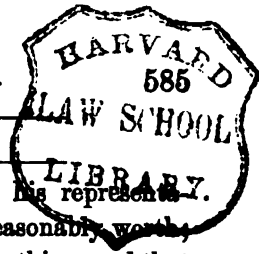
tingencies and final results which cannot be definitely ascertained and known during the progress of the work, or before the completion of the term of service, and when the agreement as to compensation is such as to contemplate the continued service unto the end as a means to accomplish the result upon and in reference to which the compensation is to be measured. Had Heermans been upon a yearly or monthly salary, and died in six months or one month after reaching California, the fair value of his services at the rate agreed upon would have been easily ascertained, at the time of his death; but upon a like termination of the service under a contract to share in the profits, there would have been no way to ascertain his compensation under the contract, and he must either upon conjectural and unreliable testimony establish the value of the unearned profits, or the value of his contingent interest in what might be earned, or await the final issue of the enterprise. His compensation as upon a *quantum meruit* was payable instantly after his death, and his representative was not bound to await the closing up of the contracts with the government or the business between the associates; and as the profits, or whether there were or would be any profits, was not and could not be then known, and the defendant—conceding that upon the work and contracts then done and finished there was a profit—was not bound to pay in advance of the actual receipt of the profits, it follows that the profits could not in an action then brought have been resorted to as evidence of the *quantum meruit*. The rights of the parties are mutual, and as the representative of the deceased might at once have brought his action for the value of the services, the defendant has the right to claim an adjustment of the damages as if the action had then been brought and the work had since been completed. The plaintiff cannot, by electing as to the time of bringing his action, vary the measure of damages. Another consideration showing that it would be unreasonable to resort to the profits as shown by the actual result accom-

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plished months after the death of the testator, as a measure of damages, is that the employment of the deceased was with a view to secure the profitable closing up of the contract and business, and because it was supposed his skill and business talents would contribute to that end, and the contract necessarily contemplated a continuance of the service to the end to secure a participation in the result. Upon what particular part of the work the profit was made cannot be known. *Non constat* it was all made after the death of Heermans, and possibly because the work fell into other hands. In *Lisk v. Sherman*, (25 Barb. 433,) the contract of service had been fully performed by the plaintiff, but the agreement as to compensation was void by the statute of frauds. It is well settled, however, that in such cases the contract may be resorted to as evidence of the value of the services and to control the recovery. (*Burlingame v. Burlingame*, 7 Cowen, 92. *Fort v. Gooding*, 9 Barb. 371. *Thomas v. Dickinson*, 2 Kern. 364.) But in the case cited it was held that the contract in such case could only be resorted to to determine the value of the services when the land, property or other thing to be given or received in compensation was fixed and determined in its nature and character, and was referred to by the parties, and possessed at the time of making the contract, a determinable value, and that it is only in such cases it can be said that the contract furnishes a measure of damages. The case before us is within the principle thus decided, and as the profits to be earned had neither at the time of making the contract nor at the time when it terminated by the death of Heermans and the right of action accrued to his representative, any determinable value, or indeed any existence, they cannot be resorted to as the measure of the plaintiff's recovery. (*And see Ham v. Goodrich*, 37 N. H. Rep. 185.) The language of the cases where the performance of the contract has been prevented by the sickness or death of the party, or other providential interposition, is peculiarly guarded, except perhaps *Jones v. Judd*, decided by a divided court. But all, I

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think, regard it settled that the laborer or his representative can only recover what his services are reasonably worth; and if they have been worthless can recover nothing, and that the contract price for the completed service does not measure the compensation for the partial and interrupted service. In *Fuller v. Brown*, (11 Metc. 440,) the plaintiff was under a contract to work by the month, and left the service on account of sickness. He recovered the contract price for the time he worked. But no question was raised as to the measure of damages, and the court cautiously and in terms refrained from expressing an opinion as to the proper compensation in such cases. *Fenton v. Clark* (11 Verm. Rep. 557,) was a contract by the plaintiff to work five months at ten dollars a month, and the plaintiff became disabled by sickness, and was allowed to recover *pro rata* for the time he had worked. He recovered as upon a *quantum meruit*, and there was no reason for departing from the contract price. Prof. Parsons, speaking of the contract of hiring, says: "But if prevented from performing the stipulated amount of labor by sickness or similar inability, he (the servant) may recover pay for what he has done, on a *quantum meruit*." (1 Pars. on Cont. 524; and see *Dickey v. Linscott*, 20 Maine Rep. 453; *Seaver v. Morse*, 20 Verm. Rep. 620.) It is nowhere held that the servant can recover ratably the contract price for the service performed. In *Fahy v. North*, (19 Barb. 341,) the recovery was restricted to the actual value of the service performed, and the recovery for the partial performance was at the rate of \$12 per month, while the contract price was \$12.50 per month. The rule established, or treated as established, by *Wolfe v. Howes*, (20 N. Y. Rep. 197,) is that the plaintiff seeking to recover for services performed under a contract, the full performance of which was prevented by the death of the laborer, could recover what the services were reasonably worth, not exceeding the contract price, and could only recover the reasonable value of the services. Allen, J. says: "The plaintiff was entitled to recover the full value of the services of the testator,

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not exceeding the rate of compensation secured by the terms of the contract." And Johnson, J. concurred; observing, "that it was material that the defendants had received actual benefit from the services of the plaintiff's testator, and that quite a different question would be presented by a case where the services actually rendered should prove valueless." The learned judges repudiated the idea that the unperformed contract regulates the compensation for services rendered in partial performance, when the contract is terminated without the fault or act of either party. It may limit the amount, and in some cases furnish a reasonable measure of damages, but not in a case like this, where the compensation was contingent and uncertain in amount. (*See Smith v. Thompson*, 8 C. B. 44.) I am of the opinion that the referee erred in the measure of damages, and that the plaintiff was only entitled to recover, 1st. The share agreed upon of the profits in building the dock; 2d. A like share of the profits arising from the use of the dock up to the time of the death of his testator; and 3d. What his services were reasonably worth to the defendant in supervising and looking after his interests in the construction of the basin and railway, which was a service entirely distinct from the service rendered the associates as their book-keeper and agent, and to be compensated in reference to their actual value, and distinct from the compensation received from the associates. If I am wrong in supposing that the three enterprises should be treated as distinct from each other, in ascertaining the amount justly due to the plaintiff, then the plaintiff should recover the value of the services of the testator for the whole time that he was in the employ of the defendant, deducting the payments received by him of the defendant for such service.

In either view the judgment must be reversed, and a new trial granted, costs to abide the event.

[NEW YORK GENERAL TERM, September 17, 1860. *Sutherland, Bonney and Allen*, Justices.]

DUFFY vs. DUNCAN and LOGAN.

32b	587
66 AD	372

Allowances and commissions to, and charges against, trustees on their final accounting. General principles upon which the account is to be taken.

Where a trust deed is silent as to the compensation to be paid to the trustees, the law implies an agreement to perform the services for the same allowance which is made by statute to executors and administrators; and the court will allow them that amount.

It is the duty of trustees under an assignment for the benefit of creditors, to keep the trust fund entirely separate and distinct from their own moneys.

If the funds are deposited in a bank they should be deposited to a separate account, and in the names of the trustees as such, to the end that they can at all times be traced and identified.

If trustees mingle the trust funds with their own they commit a breach of trust, and are legally chargeable with simple interest thereon, although they may have made no profit by their use.

In regard to trust property which comes into the hands of the trustees, all that the *cestuis que trust* can claim is, either, 1st. What the trustees may have received for it, upon a fair sale thereof, together with what they may have earned by its use; or 2d. The value of the property at the time it came into their hands.

When the trustees have not derived a profit from the use of property, and the property itself has been lost, by their fault, its value at the time of such loss is the measure of the liability of the trustees.

It is well settled that trustees cannot be permitted to use the trust funds in commercial or other business operations, at the risk of the *cestuis que trust*; and the fact that a share of an item of the trust property belongs to one of several trustees, in his own right, cannot vary the rule.

Rule as to costs, against or in favor of trustees, as between them and the *cestuis que trust*, and as between themselves.

THIS action was brought by the plaintiff in behalf of himself and all other creditors of one Joseph McMurray, who should come in and contribute towards the expense of the action, to compel an accounting by the defendants as assignees of McMurray for the benefit of creditors. The cause was referred to John L. Mason, Esq., by whom an account was stated and upon whose report a judgment was entered directing the payment by the defendants to the individuals named in the decree and declared entitled under the assignment, as creditors of McMurray, of \$16,825.47 the balance of the trust fund remaining in their hands. Both parties

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excepted to the report of the referee, and both appealed from the judgment thereon.

F. Byrne, for the defendants.

S. B. Brophy, for the plaintiff.

W. A. Butler for *S. Flanagan*, a creditor.

By the Court, ALLEN, J. The objection taken by the defendants, in their first point, that the claims set up in their answer for expenses and disbursements by and demands made against them were counter-claims, and no reply having been put in, that they stood admitted and could not be controverted, was not taken upon the trial and cannot now be urged. But if it had been taken it would have been unavailing. The matters referred to were in discharge of the defendants, and not counter-claims against the plaintiff. (*Code*, §§ 149, 150.)

The defendants next insist that the referee should, on their motion, have dismissed the complaint, on the ground that the plaintiff was estopped and barred from maintaining this action by the proceedings and decree in another action brought by one Ellen Traynor in behalf of herself and all others similarly situated, against the defendants, for an account of the same trust. That action was commenced by the plaintiff therein as a creditor of McMurray interested in the trust; the defendants answered the complaint and were ordered to account before Judge Mason. Neither the plaintiff in this action nor any other creditor of McMurray became parties to that, by coming in and proving their debts, or in any other way, and the plaintiff therein died before an accounting was had. The husband and administrator of Ellen Traynor refused to permit the suit to be revived for the benefit of creditors interested in the assignment, as appears by the statement of the referee. The practice authorized by § 119 of the code, permitting one or more parties, when the parties are very numerous and it may be impracticable to bring them all before

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the court, to sue or defend for the benefit of the whole, was familiar in the court of chancery, and was adopted from the practice of that court. It probably was only intended to govern cases which could have been the subject of a suit in equity, and only such cases as would have been within the rule as established in that court. (*Per Duer, J. Habicht v. Pemberton*, 4 Sand. S. C. R. 657.) But for the convenient rule referred to of allowing one or more to sue for himself, and all others standing in the same relation, who may elect to come in under the decree, all the creditors of McMurray would have been necessary parties to an action against the trustees for an accounting. But as, in an action thus brought by one or more, all have an opportunity of coming in and substantiating their claim before a distribution can be made, it is not necessary to make them all parties. (*Hallett v. Hallett*, 2 Paige, 15.) During the pendency of an action by one in behalf of himself and all other creditors, any creditor may make himself a party to the action and an actor in it. (*Creuze v. Hunter*, 2 Vesey, 157. *Herndale v. Hankinson*, 1 Simons, 393.) Whether a final decree in such action would bar a subsequent action at the suit of a creditor who omitted to prove his claim or make himself a party, need not be considered. (*Good v. Blewitt*, 19 Vesey, 336.) He would doubtless be bound by the judgment, so far as the trust fund should be disposed of by it, and it may be conceded that so long as a suit was pending, to which a creditor might become a party and in which all the relief asked could be had, another suit would not be permitted. (*Groshon v. Lyon*, 16 Barb. 461.) Had the plaintiff proved his claim before the referee, under the order of reference in Trayner's case, it would have been almost a matter of course to suffer him to revive the suit for his own benefit. (*Houlditch v. Marquis of Donegal*, 1 S. & S. 479.) And had he so appeared, the plaintiff could not, had she lived, have discontinued the action. Whether upon her death he would have been compelled to revive that action rather than bring a new one, need not be decided. At

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the time of Mrs. Traynor's death she was the sole party to the action, no other creditor having come in, and it was as yet her action and hers alone, and she might have discontinued it. By her death it abated, and it was optional with her representative whether he would revive it or suffer it to be revived in his name. The plaintiff could not have had the benefit of that action. (*Dixon v. Wyatt*, 4 *Mad.* 393, 2 *Barb. Ch. Pr.* 42, 67.) It constituted therefore no bar to this action.

The defendant also excepted to the report of the referee for the reason that he rejected two charges, one of \$100 and one of \$250, for money paid to the assignee. The referee properly disposes of them in his report, by the remark "that there was no evidence showing the necessity or propriety of such payments." The only evidence as to the \$100 payment is that it was paid "because McMurray said he could aid the assignees in obtaining a claim upon a judgment which he had recovered against one Robert L. Patterson for about \$2000," and upon which nothing was ever collected; an easy way of acquiring money belonging to creditors. The \$250 was paid because "Mr. Byrne recommended that McMurray should be sent to Washington, as he was acquainted with the matter, and endeavor to collect the claim" against one Clarke. The evidence shows that McMurray in fact knew nothing of the matter, and did not go to Washington, but took the money to remove himself and family to St. Louis.

The referee allowed the defendants commissions upon the moneys received and disbursed by them, after the rate allowed by law to executors and administrators. The defendants claimed five per cent upon the whole amount received by them, making \$3,667.85, instead of \$833.57, allowed by the referee. The referee, in fixing the compensation of the defendants, followed *Meacham v. Starnes*, (9 *Paige*, 398,) which is authoritative with us, and entirely satisfactory. It is there held that if the trust deed says nothing as to the compensation of the trustees, the law implies an agreement to perform the services for the same allowance which is made

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by statute to executors &c., and the court will allow them the same compensation as executors and administrators receive. The trust deed here is silent as to compensation.

The next exception of the defendants is to the amount allowed the defendants for clerk hire. The claim made was \$1350, or at the rate of \$250 per annum from the date of the assignment, December, 1850, to July 1st, 1857, with the exception of a single year. The referee found as a fact, and the finding is warranted by the evidence, that for the first year after the assignment the duties of the clerk were onerous, but that after that time the services were very trivial. Indeed for several of the quarters the only entries in the accounts of the trustees are the payment of the clerk's salary, and for some years the only entries are the payment of office rent to one of the trustees, the clerk's salary, and the costs and fees of counsel; during the time the clerk also acted as clerk for one of the trustees in his individual business; and during a part of the time was his partner. The referee allowed \$500 for the first year's services, and \$100 for all subsequent services; and the allowance was liberal when it is remembered that it is taken from a fund belonging to creditors of an insolvent estate.

The claim of the defendants for office rent paid to Logan, one of the trustees, was properly disposed of by the referee. Logan partitioned off a room 10 by 12 feet, at the end of his store, in which his own business and that of the trust was transacted. I doubt if any thing should have been allowed, and whether the commissions did not cover this charge, so long as an office was not required for this business exclusive of all other business. The defendants charged \$550, and at the rate of \$100 per annum. The referee allowed the claim for a single year, which was all that they were reasonably entitled to. It is said that by mistake only \$50 were in truth allowed. If this is so, no injustice has been done; but it is not certain that the error is not in transcribing or printing the schedule annexed to the referee's report.

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The defendants next object to the amount of interest with which they are charged by the referee, the result of the method adopted by the referee in the statement of the accounts. A conclusive answer to this objection is that there is no exception to the mode of computation of interest, or to the sums upon which, or time from which, interest was computed. Had the attention of the referee been called to the subject, and the claim now made by the defendants urged before the referee, any errors in the details could have been corrected by him in the final settlement of his report. But if the question were before us, and we could receive the statement of interest as made by the referee, I should be of the opinion that no injustice had been done the defendants. The assignment was dated December 2d, 1850, and up to March 7th, 1851, the assignees had received \$58,523.38, and October 10th, 1851, they received \$14,833.65, making \$73,357.03. Up to November, 1851, they had disbursed but \$57,117.60, and up to April, 1852, their disbursements were only \$61,149.84, and for the next five years their disbursements were but \$1231.85. Had the referee charged interest upon the moneys in the hands of the assignees at the expiration of the year after making the assignment, as he well might have done, the result, even after allowing the defendants all that they now claim, would have been less favorable than it now is.

The referee charged interest on the balance on hand on April 1st, 1852. The claim of the defendants is, 1st. That they should have been allowed interest on the commissions. The answer to which is, they were not ascertained until their accounts were adjusted, and it was in their power to close them and with them the trust at any time; and 2d. The interest should have been allowed upon the small payments made during the five last years of the trust. But 1st, as before said, if an interest account is to be stated with precision, the defendants should be charged with interest, which would overbalance this claim, if allowed; and 2d. These payments

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were a part of the expenses of the trust, and the account not adjusted until the statement of the account by the referee.

The plaintiff waives the exception taken by him to the computation and statement of interest.

The defendants further object that no interest should have been charged against the defendants. It should be borne in mind that the trust fund and assets were, very early after the assignment, converted into money, and a large sum remained in their hands, for many years, without any effort on their part to distribute it among their *cestuis que trust*. Logan admits that he used the moneys remaining in his hands, and the sum received by Duncan was mingled with his individual moneys and deposited in bank to his individual credit. It was the duty of the trustees to keep the trust funds entirely separate and distinct from their own moneys. If deposited in a bank it should have been deposited to a separate account and in the name of the trustees as such, to the end that the fund could at all times be traced and identified. By mingling the trust fund with their own they committed a breach of trust, and were legally chargeable with simple interest thereon, although they may have made no profit by their use. They did create a credit at the bank by their deposit. (*The Utica Insurance Company v. Lynch*, 11 Paige, 520.) The defendants were negligent in not paying over the money or in not loaning or investing it so as to render it productive, and upon this ground, if upon no other, were properly charged with interest after April, 1852. (*Dunscumb v. Ex'rs of Dunscumb*, 1 John. Ch. 508.) And see *Brown v. Rickets*, (4 John. Ch. 303,) in which case the trustees, as in this case, testified that they were ready at all times to have paid the plaintiff out of the trust fund.

The defendants, as assignees of McMurray, claimed and received from the treasurer of the state, upon the warrant of the comptroller, several thousand dollars under the provisions of chapter 534 of the laws of 1851, for money paid under protest, by McMurray, to the mariner's fund, and which by

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the act referred to was directed to be paid "to the merchants masters or owners or their assigns, of the several vessels, on account of which said moneys" had been paid. The defendants now claim that of this amount \$3107 was for money received by McMurray of one James Miley, and was paid by McMurray to the state as the agent of Miley, and that this amount should have been deducted from the sum charged to the defendants. A conclusive answer to the objection is that there was no evidence of the truth of the allegation, and no legal proof upon which the referee could have decided that any part of the money paid by McMurray to the state and refunded to the defendants as his assignees was the money of Miley. The only witness is the clerk of McMurray, Collins, who swears that his only knowledge of the facts is derived from the books of McMurray, and that he had no knowledge that Miley paid any money to McMurray, or that he was the owner or agent of the vessels consigned to McMurray and in respect to which the money was paid. In the absence of evidence that Miley had any legal or equitable claim to the fund, the referee very properly charged the defendants with that which was apparently trust money, and which they claimed and received as assignees of McMurray, and treated as a part of the estate of the debtor. Again; there is no ruling of the referee in respect to the Miley claim. Miley made a claim before the referee, but failed to prosecute the claim, and gave no evidence in support of it. It was dismissed for the want of prosecution, and an omission to comply with the order of the court requiring him to contribute to the expenses of the suit. The defendant cannot object to the regularity or propriety of this proceeding, and Miley has not appealed. What would have been the rights and liabilities of the defendants if they had proved that the sums claimed were in truth paid by McMurray as the agent of Miley, and from moneys furnished by him for that purpose, need not be considered. It is sufficient to say that it would by no means follow that receiving it as trustees and not having been called

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to account by Miley, they would be excused from accounting for it under the trust.

Evidence was given of a payment of \$475.15 for repairs to the steamer John Jay, but it does not appear by the answer of the defendants, or by any proceeding in the case, that the defendants claimed this payment as a credit, and in their discharge as assignees. Neither does it appear that the referee was asked to allow it, or that he made any decision covering it; and there is no exception in the case to any ruling of the referee in respect to this claim. This item is not contained in the account of the defendants appended to their answer. The point made upon the argument, founded upon the omission of the referee to allow the payment to the defendants, is not therefore tenable. It is possible that the defendants might have made a case entitling them to this allowance, but they should have laid a foundation for it in their account rendered, and by a distinct claim before the referee.

A further objection in behalf of the defendants to the report and judgment is, that but three fourths of the costs and expenses of defending the steamer John Jay against certain proceedings taken against her in the courts of the United States were allowed to the assignees, while the remaining one fourth was adjudged as properly chargeable to the defendant Logan, who was one fourth owner of the steamer in his own right. The facts are briefly but substantially stated in the report of the referee. McMurray purchased the vessel in May, 1850, for himself and Logan, taking the title in his own name and giving a chattel mortgage for a part of the purchase money. The vessel was run for the benefit of McMurray and Logan until the assignment by McMurray, and the libel was filed to foreclose the chattel mortgage, and was dismissed by the court for want of jurisdiction. A bare statement of the case shows the propriety of charging Logan with one fourth of the expense of defending the action, and to this extent relieving the trust estate. To charge the estate with all the costs would be grossly unjust. It is said that Logan,

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when he took title from McMurray, did not know of the existence of the mortgage. If this were so and he was defrauded by McMurray, his claim is against McMurray, and he cannot right himself by seizing the fund set apart for his creditors. Another reason why he should not be indemnified out of the estate and at the expense of the creditors is, that, having been successful in defending the vessel against the claim, he had no claim against McMurray and still less against the estate. He did not lose title to the vessel, and was not properly subjected to any costs in the defense of his title. Neither McMurray nor his estate should be made to pay for a suit brought without cause against the vessel, or Logan, as claimant.

Both parties except to the decision of the referee in stating the account with the trustees in respect of the steamer John Jay and her earnings while employed by the assignees. At the time of the assignment the three-fourths interest of the assignor was not worth the incumbrance upon it, and was of no value. The assignees repaired her at joint expense and employed her as they could until she was lost, when they settled with the underwriters, receiving from them a sum agreed upon in satisfaction of the policy. There is no claim that they did not receive all they were entitled to demand upon the insurance. Upon a statement of an account of their operations with and expenses in and about the vessel, and after crediting all sums received from the underwriters and for earnings, and from all other sources, there was a loss to the assignees of about \$2500. Some years after this they bought in the notes of McMurray outstanding, and to secure which the chattel mortgage had been given, for \$300. The referee decided 1st. That the assignees were only chargeable with the value of the vessel at the time they took her under the assignment, and to this the plaintiff excepts; and 2d. That the defendants were not entitled to be reimbursed out of the trust fund for any part of the losses sustained in run-

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ning the steamboat: to this the defendants except. Both exceptions must be overruled.

All that the *cestuis que trust* can claim of the trustees is, either 1st. What the trustees may have received for property, upon a fair sale, together with what they may have earned by its use; or 2dly. The value of the property at the time it came into their hands. When the trustees have not derived a profit from the use of property, and the property itself has been lost by the fault of the trustees, its value at the time of its loss is the measure of the liability of the trustees.

In this case the trustees have made nothing by the use of the vessel. She was of no value at the time of the assignment, and could not have been sold for any sum; so that the creditors have lost nothing by the omission of the trustees to sell. If she had been lost, without an insurance, no question could have arisen. But it is said that the defendants have received the amount of the insurance, and as they have not paid the incumbrance they should account for this. But the plaintiff asking equity must do equity; in other words, while enforcing an equitable claim care must be taken not to violate the first principles of equity. The evidence is that the vessel, at the time of the assignment, was unseaworthy, and that her principal value at the time of her insurance and loss was made up of the repairs put upon her by the defendants. If the defendants are to be charged with the amount received from the underwriters, they should be credited with what they have paid to make the vessel insurable, which would open all their accounts with the vessel. But the plaintiffs further urge that as the defendants purchased the debt which was a lien on the vessel, for a nominal sum, they should be charged with the value of the vessel less this sum. This would have been right had the vessel been *in esse* when they bought the claim. But the vessel had been lost and the liability of the defendants fixed. The debt was no longer a lien on any property, and by the purchase only the estate at large was relieved *pro tanto*. The defendants should not, in

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the absence of fraud, be charged beyond the value of the property received by them. And this does ample justice to the *cestui que trust*, who ought not to speculate out of the defendants.

That trustees cannot be permitted to use the trust fund in commercial or other business operations at the risk of the *cestui que trust*, is too well settled to require argument or authority to support it; and the fact that one-fourth of the vessel was owned by one of the trustees in his own right cannot vary the rule. As trustee of the three-fourths he was bound to sell that interest, or if he violated his duty as trustee by omitting to sell, he could not subject the trust estate to the risks incident to the business in which he might choose to employ the vessel. (*Willard's Eq. Jur.* 188.) The referee properly rejected the claim to be reimbursed from the trust estate three-fourths of the loss resulting from the use of the vessel.

The last ground urged by the defendants, for a reversal or modification of the judgment, is the refusal of the referee to charge the estate with the costs of defending the suit brought by Ellen Traynor against the trustees. The main object of the suit was to charge the defendants with the value of the store No. 69 South street, a part of the assigned property which had been purchased by Logan at the assignee's sale. The purchase by Logan was a breach of trust, and the court ordered a resale of the property, as of course. Had the suit been prosecuted to a final decree the court would have charged the trustees, personally, with the costs. The suit was rendered not only proper but necessary by the wrongful act of the trustees, and the redress of the wrong should not be at the expense of the trust. The referee properly says in his opinion, "where a trustee purchases the trust property, he purchases it subject to this right, and any costs to which a *cestui que trust* may be put in obtaining a resale under the decree of the court are properly chargeable to the trustee who has occasioned them." (*Sanderson v. Walker*, 13 Ves.

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601. *Van Epps v. Van Epps*, 9 *Paige*, 238.) This claim was properly rejected by the referee.

The plaintiff objects to the allowance of a credit to the defendants of \$1068.05 paid by them to Edward Fiske. The payment was thirty per cent of the sum received from the state under the act of 1851, for hospital moneys refunded. Fiske was employed by merchants in New York city to procure the passage of the law, under a promise to pay him thirty per cent of the amount received; he agreeing to pay Mr. Webster for the argument of the cause in the supreme court of the United States, in which the exaction of the moneys by the agents of the state had been pronounced illegal. There was reason to suppose that McMurray might have been a party to this agreement, but it was not proved. But it was proved that other parties benefited compensated Fiske in pursuance of the arrangement, and as the estate had an equal benefit in the services, it was reasonable that it should bear an equal share in the burthen. The assignees paid in good faith, and the compensation was not deemed unreasonable in amount, by others similarly situated, and acting for themselves. It would have been unjust to the assignees to have disallowed this credit.

The plaintiff also objects to the allowance of any part of the costs and counsel fees expended in the defense of the John Jay. But the vessel was a part of the assigned property, and it was the duty of the trustees to protect it, to the end that it might be made to bring the highest price and protect the residue of the estate from the liability to contribute to the payment of the mortgage debt. As the good faith of the assignees in incurring the expense is not impeached, the allowance was proper.

The costs were in the discretion of the court below, and as there is no charge in the complaint of fraud or wanton neglect of duty on the part of the defendants, we cannot say that the discretion was abused; especially as it was a proper case for coming into court for the settlement of the accounts. If the defendants had not been called into court by a credi-

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tor they would have been obliged to call the creditors into court in an action by themselves for the closing up and settlement of the trust.

The last exception to be considered is that of the plaintiff to the allowance of the claim of Simon Flanagan as a debt payable out of the trust fund. Flanagan was the agent of the assignor, at Saratoga Springs, for the sale of passage certificates or tickets from Ireland to New York, and sold several and remitted the moneys received to McMurray. The certificates were dishonored after the failure of McMurray, and Flanagan repaid the money to the parties holding the certificates. The referee held Flanagan a creditor to the amount so paid by him, and in this there was no error. The holders of the certificates were clearly creditors of McMurray, and could have proved their debts under the order of reference; and Flanagan, by payment of the sums, succeeded to the rights of the several holders. It did not require a formal assignment. He took the certificates, and thus by delivery became the holder of them as vouchers. Situated as he was, and holding the peculiar relation he did to those whom he had induced to purchase the certificates, he could not be called a volunteer in refunding the amounts received.

The judgment must be affirmed, and as between the plaintiff and defendants, as each have appealed, as against the other, and neither has succeeded upon any of the exceptions taken, neither is entitled to costs, either against the other or to be paid out of the fund, but each must pay his own costs.

The appeal against Flanagan is not sustained, and as he has been brought into court to defend a very honest and proper claim, he is entitled to the costs of the appeal, to be paid by the plaintiff. Judgment is therefore affirmed, with costs to Flanagan, to be paid by the plaintiff, and without costs either to the plaintiff or defendants as between each other or as against the fund.

[NEW YORK GENERAL TERM, September 17, 1880. *Sutherland, Leonard and Allen*, Justices.]

KELLY, sheriff, &c. vs. BREUSING.

32b 601
33b 123
48c 520

A complaint stated that the plaintiff was sheriff, &c.; that on, &c., he received a warrant of attachment, duly issued out of the supreme court, and to him directed, in an action against S., whereby he was directed to attach and keep all the property of S. in his county; that the defendant then had in his possession \$800 belonging to S.; that on, &c., the plaintiff made due service of said warrant on the defendant, by delivering to, and leaving with him a copy, with a notice showing the property levied on; whereupon the plaintiff became entitled to receive from the defendant, and he became answerable to the plaintiff for said \$800, which he refused to pay over to the plaintiff, or to account to him for, to his damage \$400. *Held*, on demurrer, that the statement, as to the official character of the plaintiff, was sufficient to show his capacity to maintain the action.

Held, also, that the complaint was sufficient in form, in other respects, and that the plaintiff was entitled to judgment on the demurrer.

DEMURRER to complaint. The complaint states that the plaintiff is sheriff of the city and county of New York; that in April, 1860, he received a warrant of attachment, duly issued out of this court, and to him directed, in an action against Hermann Schmidt, whereby he was directed to attach and keep all the property of Schmidt, in his county. That the defendant then had in his possession \$300, belonging to Schmidt. That on 9th April, 1860, the plaintiff made due service of said warrant on defendant, by delivering to and leaving with him a copy, with a notice showing the property levied on; whereupon the plaintiff became entitled to receive from the defendant, and he became answerable to the plaintiff for said \$300, which the defendant refuses to pay over to the plaintiff or to account to him for, to his damage \$400, for which sum he demands judgment. The defendant demurred, and assigned for causes of demurrer: 1. That the plaintiff has not legal capacity to sue. 2. That the complaint does not state facts sufficient to constitute a cause of action.

Arthur & Gardiner, for the plaintiff.

B. Roelker, for the defendant.

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BONNEY, J. The plaintiff states that he is sheriff of the city and county of New York, duly elected, qualified and acting, and that statement is clearly sufficient to show his capacity to maintain any action which such sheriff is authorized to bring. He is here acting in his official capacity as sheriff, and not as an officer of the court, or as deriving his authority to execute the warrant from any appointment, order or judgment of the court. The question in the case is, has he stated facts sufficient to constitute a cause of action?

The code (§ 227 to 231) prescribes the form of a warrant of attachment, and under what circumstances, how and by whom it may be issued, and § 232 to 236 make provision for its execution. It is made the duty of the sheriff, "*to whom such warrant of attachment is directed and delivered,*" to attach all the real and personal estate of the debtor, *including money and bank notes*, and to take into his custody the books, vouchers and papers relating to the property, debts, &c. of such debtor, and safely keep the same. Any individual holding any property for the benefit of, or owing any debt to such debtor, is required, on application of the sheriff, to furnish him a certificate thereof; and any debts or other property incapable of manual delivery may be attached by leaving a certified copy of the warrant of attachment with the debtor or individual holding such property, with a notice showing the property levied on. And the sheriff "*shall, subject to the direction of the court or judge, collect and receive into his possession, all debts, credits and effects of the defendant.*" The sheriff may also take such legal proceedings, either in his own name or in the name of such defendant, as may be necessary for that purpose, and discontinue the same at such time and on such terms as the court or judge may direct."

And under § 238, the actions authorized to be brought by the sheriff may be prosecuted by the plaintiff, (in the attachment suit,) or under his direction, upon his indemnifying the sheriff against damages, &c.

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For all acts which the sheriff is directed or authorized to perform the warrant of attachment is his sole and sufficient authority. On receiving such warrant he *must attach* the property of the defendant, and *may bring any action* necessary to obtain possession of such property. The objection by the defendant's counsel that the complaint does not show how and under what circumstances the warrant in this case was obtained, is not well taken.

Another objection pressed by the defendant's counsel, on the argument, was that the complaint did not state how the alleged indebtedness of the defendant to the debtor Schmidt arose; to which it is answered that the complaint does not state any such indebtedness at all, but alleges that the defendant had in his possession money to the amount of \$300, or thereabouts, belonging to Schmidt. If the statement had been that the defendant had a horse worth \$300, belonging to Schmidt, the statement would, I presume, have been deemed sufficient, and I cannot see why it is not equally so when the property is stated to be money. In either case, if the horse or money had been in view of or attainable by the sheriff, it would have been his duty to take it into his possession, and doubtless he would have done so.

Again; it is objected that this complaint does not show a sufficient execution of the attachment to reach the property claimed. The statement is that the plaintiff (the sheriff) made due service of the attachment by delivering to and leaving with the defendant a certified copy of the warrant, and "*a notice showing the property levied on.*" This statement as to notice is in the words of the code, § 235, and I think sufficient on demurrer; although it would have been more specific if it had stated the terms of the notice, or that it mentioned the \$300, as the property levied on.

The code, § 238, permits the prosecution, by the plaintiff in the attachment suit, of any actions which the sheriff is authorized to bring, upon such plaintiff giving to the sheriff proper indemnity, and we may presume this action is prose-

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cuted under that section, and so answer the objection that the complaint does not show that the action is brought by or under direction of the court, if indeed it would be necessary in any case to state that the action is so brought.

After examining the provisions of the statutes, and the authorities to which I have been referred as containing principles supposed to be applicable to this case, I am satisfied that the complaint is sufficient. The plaintiff must have judgment on the demurrer, with leave to the defendant to answer in twenty days on payment of costs.

[NEW YORK SPECIAL TERM, October 1, 1880. *Bonney*, Justice.]

TOWSLEY vs. McDONALD.

Requisites of the affidavit on which an order for the publication of a summons is applied for.

The affidavit must not only show the existence of a cause of action, and that the defendant cannot, after due effort and diligence, be found within the state, but it must further appear, when the application is under subdivision 2 of section 135 of the code, that being a resident of the state, the defendant has departed therefrom with intent to defraud his creditors or to avoid the service of a summons, or keeps himself concealed therein with the like intent.

To establish an intent to defraud creditors, the affidavit must show that the defendant has property, of some kind, and that he has made or is about to make, a fraudulent or illegal disposition of it; or that he unjustly refuses to apply it to the payment of his debts; or has secreted or removed, or is about to secrete or remove it; or has fraudulently incumbered it.

To authorize an order for publication on the ground of a departure from the state, by the defendant, with intent to avoid the service of a summons, the affidavit must furnish proof of such intent.

Where it did not appear, from the affidavit, that any summons was out against the defendant, when he left the state; or that any was about to be issued against him; or that he was threatened with, or feared, or expected a suit; and there was nothing stated therein from which it could be seen or fairly inferred that he had any intent either to defraud creditors, or to avoid the service of a summons; *Held* that the affidavit was defective, and an order for publication, founded thereon, unauthorized and void.

Where an order for the publication of a summons is granted under subdivision

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2 of section 185 of the code, which presupposes that the debtor is a resident of the state, but has departed therefrom, or kept himself concealed therein, and it also appears from the affidavit that he is a resident of a particular place in this state, the order must direct service of the summons and complaint to be made upon the defendant by mail.

If an order for the publication of a summons is granted upon an insufficient affidavit, and does not direct service of the summons and complaint to be made by mail, in a proper case for such a service, the court acquires no jurisdiction of the case, and a judgment entered therein is void.

B., the owner of land, contracted with M. to convey the same to him, on being paid the sum of \$160, and M. went into possession, under the contract. The contract was subsequently assigned by B. to C. to secure the payment of an antecedent debt; *Held* that after the execution of the contract B. was, in equity, the trustee of the legal title for M., and M. the trustee of B. as to the unpaid purchase money. That this relation continued until B. assigned the contract to C.; after which time M. was the trustee of C. as to such unpaid purchase money; and B.'s position was that of a mere naked trustee of the legal title, with no right or interest in the land, on which a lien by judgment could attach.

Held, also, that C. had a right to take an assignment of the contract, in payment or as security for an antecedent debt due from B.; and that such debt was a sufficient consideration to constitute him a *bona fide* purchaser, as against the claims of other creditors of B.

THIS action was brought for the recovery of real property. The premises in controversy were conveyed to George T. Benham, May 7, 1853. In 1855, Benham contracted with the defendant to convey to him the premises, on being paid \$160, and the defendant went into possession under this contract. About January 1, 1856, Benham absconded, leaving the defendant in possession under the contract of purchase, on which he had paid only the sum of \$43.97.

In January, 1856, the plaintiff commenced an action against Benham; in the supreme court, by the issuing of a summons which the sheriff returned, with his return dated January 15, 1856, stating that he had used due diligence to find Benham, and that the latter could not be found in his county. Thereupon, and on the 16th January, the plaintiff obtained an order for the service of the summons by publication, under section 135 of the code of procedure. Proceedings were taken in that action, resulting in a judgment against Benham

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for \$157.93, entered May 1, 1856. Benham did not appear in the action. An execution was issued on the judgment, under which the premises in controversy were sold on the 16th August, the plaintiff being the purchaser. On the 10th December, 1857, the sheriff conveyed to the plaintiff pursuant to this sale. In April following this action was commenced.

The contract of purchase between Benham and the defendant was made August 28th, 1855. This contract was assigned by Benham to S. W. Codman, March 17th, 1856, and the plaintiff had notice of the assignment about the 25th of the same month. Benham had been previously paid \$43.97 by McDonald, and the balance due upon the contract he paid to Codman as follows: \$16.03, August 6th, 1856; \$64, October 2d, 1857; and \$53.50, December 14th, 1857.

The defendant resisted the recovery, on the following grounds: 1st. That the judgment in favor of the plaintiff against Benham was void for want of jurisdiction. 2d. That even if the judgment was valid, the plaintiff acquired, by the sheriff's sale, only the legal title to the premises, subject to the equitable rights of other parties under the contract of purchase between Benham and the defendant; that those equitable rights embraced the entire property, inasmuch as the defendant had a right to a conveyance on paying the balance of the purchase price, according to the terms of the contract, and Codman had a right to demand and receive payment, he being the assignee of the claim, before the judgment lien attached.

The plaintiff had judgment for the possession of the premises unless the defendant should elect to pay him the balance due on the contract of purchase at the date of the entry of judgment, with costs of the action; from which judgment the defendant appealed to the general term.

Pond & Hand, for the appellant.

S. Brown, for the respondent.

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By the Court, Bockes, J. It is objected that the judgment against Benham was void for want of jurisdiction. The objection is based on the alleged insufficiency of the affidavit on which the order for publication of the summons was granted—and on the omission in the order to direct a copy of the summons and complaint to be deposited in the post office, directed to the person to be served, at his place of residence.

Section 135 of the code of procedure provides for the service of a summons by publication, when it shall be made to appear, by affidavit, to the satisfaction of the court or officer, that the person on whom the service is to be made cannot, after due diligence, be found within the state; that a cause of action exists against the defendant in respect to whom the service is to be made; and when it shall also be made further to appear, (under sub. 2,) that the defendant, being a resident of this state, has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent.

The affidavit shows clearly the existence of a cause of action, and that the defendant Benham could not, after due effort and diligence, be found within the state. But other facts must yet be established before the court or officer is authorized to make the order. It must further appear, when the application is under subdivision 2, that, being a resident of the state, he has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent.

The affidavit, which was made July 15th, 1856, stated, that he was a resident of Chester, Warren county, during the years 1853, 1854 and 1855, and disappeared from the neighborhood about the 1st of January, 1856, leaving his family at his late residence; that he had not since returned; that the affiant, the plaintiff, had made inquiry for him and had been informed that he had been in Vermont, and had left there for the west; that the affiant was informed by the wife of the defendant that she did not know where he was; that

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- he took a change of clothes ; that she did not know of his intention to go away, but thought he would not return ; that he drank hard, and told her a few days before he left, that he could not pay his debts ; that George W. Glynn informed affiant that the defendant had said to a friend that he was intending to run away and had made preparations to go, and had once actually started.

From all this it may well be inferred that he was a resident of the state, but had departed therefrom, or kept himself concealed therein. It remains now to be seen whether there is any evidence that such departure or concealment was with the intent either to defraud his creditors, or to avoid the service of a summons.

The affidavit does not show that he had it in his power to perpetrate a fraud on his creditors. It does not appear that he had any property whatever. (*See Stanbro v. Hopkins*, 28 Barb. 266.) To establish an intent to defraud creditors, it was necessary to show that he had property of some kind ; and that he had made or was about to make a fraudulent or illegal disposition of it ; or that he unjustly refused to apply it to the payment of his debts ; or had secreted or removed, or was about to secrete or remove it ; or had fraudulently incumbered it.

Nor is there any proof whatever of an intent to avoid the service of a summons. It does not appear that any summons was out against him when he left ; or that any was about to be issued against him ; or that he was threatened with, or feared, or expected a suit. Indeed nothing whatever is stated in the affidavit from which it can be seen or fairly inferred, that he had any intent either to defraud creditors or to avoid the service of a summons.

The case does not present a question on the sufficiency of the proof merely, calling for the exercise of discretion and judgment in regard to the intent of the debtor : but there is a total absence of proof on that subject. (3 Const. 47,

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and cases cited.) The order was therefore unauthorized and void.

The order too is fatally defective, in not directing service of the summons and complaint on the defendant, by mail. The code (§ 135) provides that in case of publication, the court or judge must also direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served, at his place of residence, unless it appear that such residence is neither known to the party making the application, nor can with reasonable diligence be ascertained by him.

In the case under consideration, the order was granted under subdivision 2 of section 135, which presupposes that the debtor is a resident of the state, but had departed therefrom, or kept himself concealed therein.

To authorize the granting of the order, under subdivision 2, it was necessary to show that the debtor was a resident of this state; and it has been above determined that the affidavit was sufficient to show that fact, but was defective only on the subject of *intent*. It shows very clearly that his residence was Chester, Warren county, and that he had departed therefrom. It cannot be said therefore that his residence was unknown to the party making the application for the order.

Subdivision 2 was intended to reach a case where the debtor had departed from his residence in this state into another state, or concealed himself in this state.

Assume it to appear that he had changed his residence into another state, or that his residence was unknown, and the application for the order under subdivision 2, is clearly without support. But the affidavit, in my judgment, establishes the fact of his "being a resident of this state," at Chester, Warren county. It is averred that during the years 1853, 1854 and 1855, he was a resident of the town of Chester, that he departed therefrom about the 1st of January, 1856, sixteen days before the making of the application for the order, leaving his family at his usual residence, where they still re-

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mained. It would seem impossible to say that he was a resident of the state on the 16th January, judging from the facts alleged in the affidavit, unless it be that his residence was at Chester. Indeed, it appeared that he was a resident of Chester, or it did not appear that he was a resident of this state.

If it appeared that he was not a resident of the state, the order was unauthorized under subdivision 2 of section 135 of the code; and if it appeared that he was a resident of this state, it further appeared that he was a resident of Chester, and then the order was defective in not directing service of the summons and complaint by mail.

It follows from the above conclusions that the judgment against Benham was without jurisdiction and void; and of course the plaintiff obtained no title to the premises by his purchase under it.

But even if the judgment against Benham be deemed valid, there still remains a difficulty in the way of a recovery in this action.

The judgment was not recovered against Benham until May 1, 1856; at which time Benham had no interest in the premises on which the judgment could take effect as a lien.

After August 20, 1855, the date of the contract between Benham and the defendant, Benham was in equity the trustee of the legal title for the defendant, and the defendant the trustee of Benham as to the unpaid purchase money. This relation continued until Benham assigned the contract to Codman, March 17, 1856; and after this assignment the defendant was the trustee of Codman as to such unpaid purchase price, and Benham's position was that of mere naked trustee of the legal title, with no right or interest in the lands on which a lien by judgment could attach. So long as he had a right to any part of the purchase money and continued to hold the legal title, a judgment against him would attach to the extent of such right. (*Moyer v. Hinman*, 3 Kernan, 180. See cases cited in opinion of Hand, J., page 190.) Chancellor Walworth remarks in *Keirsted v. Avery*, (4

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Paige, 9, on page 15,) "It is now well settled that a judgment lien, being merely a general lien on the land of the debtor, is subject to every equity which existed against the land in the hands of the judgment debtor at the time of the docketing of the judgment. And the court of chancery will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor has in the estate."

At the time the judgment was recovered, Benham had no right whatever in the premises. After his assignment of the contract to Codman, on the 17th March, 1856, no right or equity remained to him under it, and of course the plaintiff could acquire none by virtue of the judgment and execution sale. Codman was entitled to demand and receive the balance of the unpaid purchase price from the defendant; and although Benham retained the legal title, still the equitable title was in another. It was held, in *Ells v. Towsley*, (1 *Paige*, 280,) that the lien of a judgment does not, in equity, attach upon the mere legal title to land existing in the defendant, when the equitable title is in a third person.

The case was decided at the circuit, on the ground that the plaintiff held a superior equity over Codman, inasmuch as Codman received the assignment of the contract in payment, or as security, for an antecedent debt. But, for aught that appears from the case, Codman paid a good and valuable, if not a full consideration, for the contract. He had a right to take it in payment or as security for an antecedent debt, and such debt would be a sufficient consideration to constitute him a *bona fide* purchaser. This is expressly decided in *Seymour v. Wilson*, (19 *N. Y. R.* 417, 421.) It is there said, that when the transfer is to a *creditor* of the vendor, it is not necessary that the vendee, in order to protect himself from a claim by other creditors, should show any new consideration paid; that in such case the debt paid or secured by the transfer, is a sufficient consideration to constitute him a *bona fide* purchaser.

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The question, whether the assignment of the contract by Benham to Codman was made with intent to hinder, delay or defraud the creditors of Benham, and hence void, was not considered below, and hence need not be discussed on this appeal, if, indeed, it could arise in the case.

Judgment reversed and new trial ordered; costs to abide the event.

[ST. LAWRENCE GENERAL TERM, October 8, 1860. *James, Rosabrans, Potter and Becket, Justices.*]

THE PEOPLE, *ex rel.* Adele M. Son, *vs.* WILLIAM MINER,
register of the city and county of New York.

Upon a certificate, executed and acknowledged by one of three mortgagees, which describes him as "acting executor of the estate of A. C. deceased," and states that the mortgage therein mentioned has been paid, and consents that the same be discharged of record, the register is not bound to discharge a mortgage given to the person executing the certificate and two others, as executors, where there is nothing to show the facts in respect to the origin of the mortgage, or the purpose for which it was made, or the persons interested therein, or for what purpose it was received or held by the mortgagees, or whether for their own benefit, or as trustees upon an express trust created by the will of their testator, or for any other purpose.

And the register cannot be compelled, by mandamus, to discharge the mortgage upon such a certificate.

TO an alternative mandamus commanding him to satisfy of record the mortgage, hereinafter mentioned, or show cause &c., the register of New York made return, to which the relator demurred. By the papers it appeared that on the 28th day of May, 1856, there was recorded in the register's office, a mortgage made by the relator to "David P. Cargill, Valentine Cargill and Robert Prince, executors of the last will and testament of Abraham Cargill deceased," to secure the payment of four thousand dollars, with interest, being part of the purchase money for the premises in such

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mortgage described, which by deed executed at the same time with the mortgage, were conveyed by the mortgagees to the relator; that the relator afterwards presented to the register a certificate that said mortgage was paid, and a consent that the same be discharged of record, purporting to be made by "Robert Prince, acting executor of the estate of Abraham Cargill deceased," and subscribed "Robert Prince, executor of the estate of Ab'm Cargill, deceased," with a certificate of the acknowledgment thereof, and requested to have the same filed and recorded, and said mortgage satisfied of record; which request the register refused, and the court was now asked to compel by peremptory mandamus the satisfaction of said mortgage.

Harris Wilson, for the relator.

R. H. Bowne, for the respondent.

BONNEY, J. To obtain the writ of mandamus the applicant must show that it was the duty of the person against whom the writ is demanded to perform the act required of him, that he has been requested to perform such act, and has refused so to do. In this case a request and refusal to perform are shown; and the sole question is as to the duty of the register in the premises. The statute provides that a mortgage shall be discharged by the officer having the custody of the record, "whenever there shall be presented to him a certificate, signed by the mortgagee, his personal representatives or assigns, acknowledged or proved and certified, &c." (3 *R. S.* 5th ed. p. 57, § 60.) The only papers before the register in this case, upon which he was required to act, were the record of the mortgage and the certificate of satisfaction. He had no right or authority to inquire into, or take cognizance of, any facts not appearing from those two papers. It is undoubtedly well settled, as is contended by the counsel for the relator, that executors are considered but one person in law,

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and the acts of one, in relation to the personal property of the testator, are deemed the acts of all; and that a certificate of satisfaction made by one of several executors is sufficient to discharge of record a mortgage made to their testator. (*Wheeler v. Wheeler*, 9 Cowen, 34. *Stuyvesant v. Hall*, 2 Barb. Ch. R. 151.) It has also been held by the court of last resort in this state, that one of two executors can make a valid assignment of a mortgage executed to them as executors, to secure part of the consideration for the land in the mortgage described, which land was of the testator, and was sold by said executors pursuant to the provisions of, and authority given by, the will. (*Bogert v. Hertell*, 4 Hill, 492.) In the last mentioned case, all the facts were, in due form, presented, by pleadings and proofs, to the court, which was thereupon required to determine a question of right between the parties then before it; and if, upon all the facts recited in this alternative mandamus, duly presented and proved, it was to be determined by the court as between parties properly before it, whether or not the executor, who signed and acknowledged the certificate of satisfaction now in question, had power to receive payment of and discharge this mortgage made to him and his co-executors, the last mentioned case would be authority for an affirmative decision.

But such is not the aspect of the case now before me. The relator made the mortgage in question, and is interested in procuring it to be discharged. The respondent is a public officer, bound to perform the duty imposed on him by law, and, it is to be presumed, willing to perform it properly. Upon a certificate purporting to have been executed and acknowledged by one of three mortgagees, described as executors, he is requested to discharge a mortgage made to them. Neither the record of the mortgage nor the certificate shows for what purpose the mortgagees received or held the mortgage; whether for their own benefit, or as trustees upon an express trust created by the will of the testator, or for any other purpose. From the record it appears, that the mortgage was

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made to secure part of the purchase money for the premises therein described, then conveyed by the mortgagees to the relator; but of any other facts in relation to the origin of the mortgage, or the purpose for which it was made, or the persons interested therein, the respondent, as a public officer, had and could have no information upon which in discharging his duty as such officer he could act. He is presumed to have known, as matter of law, that if the mortgage was part of the personal property belonging to the estate of the testator, held by the mortgagees as executors only, then one of said mortgagees had power to discharge it of record; but if the words "executors &c." following the names of the mortgagees in the mortgage were only words of description, and said mortgagees owned and held said mortgage as tenants in common of a chattel for their own personal benefit; or if they held the same upon an express trust to be executed by the three, in either of such cases the certificate of one would not authorize the satisfaction of the mortgage upon the record. Without the authority of any judicial decision of the question by any court, this, as is shown by the return to the alternative mandamus, has been the construction given to the law, and the practice, in the register's office in this city for the last thirty years. In the recent case of *Peck v. Mallams*, (6 *Selden*, [10 *N. Y. Rep.*] 509,) it was held that a mortgage made to "*T. B. acting executor of the estate of T. T. deceased*," was prima facie the private property of T. B. in his own right, and the words "acting executor, &c." were only words of description.

In my opinion the register properly refused to satisfy the mortgage in question, upon the certificate, which was presented to him, and is entitled to judgment on the demurrer to his return to this alternative mandamus. The question is important, and will, I presume, be carried to the general term, for further consideration.

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THE ERIE AND NEW YORK CITY RAIL ROAD COMPANY *vs.*
OWEN.

There are two modes in which a person may become a stockholder in a rail road company, incorporated under the general rail road act, viz: by subscribing the articles of association and becoming a member of the corporation, as provided in sections 1 and 2, of the statute; or by subscribing to the capital stock, in the book opened by the directors, after the corporation is in existence.

No one who has only signed articles of association before the corporation came into being, is a corporator, or a member of the corporation, unless the articles so signed by him have been filed in the office of the secretary of state, as required by the statute.

Where duplicate sets of articles are used for the purpose of obtaining subscriptions, and one set, signed by several persons, and accompanied by the proper affidavit, is filed in the office of the secretary of state, while the other set, subscribed by different individuals, is not so filed, the subscribers to the latter paper do not become members of the corporation, and are not liable upon their subscriptions.

APPEAL from a judgment entered upon a trial by the court. Articles of association, pursuant to the general rail road act of 1850, were prepared, dated July 11th, 1851, and signed by some 250 persons, promising to take an amount of stock which was sufficient, according to the statute. A proper affidavit was annexed to the articles, taken March 8th, 1852, and those articles were filed in the office of the secretary of state, on the 12th of March, 1852, and the plaintiffs became duly incorporated. Articles exactly like those filed were also used for the purpose of obtaining subscriptions, &c., and the defendant became a subscriber to one of these articles, for two shares, some time prior to the making of the affidavit to the articles which were filed.

The articles subscribed by the defendant, and some other persons, were never filed in the office of the secretary of state. The action was brought to recover the amount of the defendant's subscription. The court directed judgment for the defendant, and the plaintiff appealed to the general term.

Hazeltine & Clark, for the plaintiff, cited the *General Rail Road Act*, §§ 1, 2, 3, 4 and 5; 16 *N. Y. R.* 451, 457; 7 *Barb.* 157; 2 *Hill*, 153; 1 *Kern.* 102; 20 *Barb.* 155; 21 *id.* 454, 541.

Cook & Lockwood, for the defendant, cited the *Statute*, and 18 *Barb.* 297.

By the Court, MARVIN, P. J. The case presents a single question. The projectors of a rail road prepared articles of association in due form, in which thirteen directors were named, and as a matter of convenience, duplicated those articles for the purpose of obtaining subscribers. To one set of these articles, a sufficient number of subscribers, and a sufficient amount of stock were obtained, to justify the making of the affidavit required by the general rail road act, and such affidavit was made, and the articles and affidavit were filed, and the plaintiff became duly incorporated. The defendant and some others subscribed a set of the articles, which were not filed in the office of the secretary of state, and to which no affidavit was annexed, prior to the making of the affidavit and filing the articles. Thus, the precise difference between this case and *Lake Ontario &c. Rail Road Co. v. Mason*, (16 *N. Y. Rep.* 451,) is, that in the latter case, all the duplicate articles were attached together, and with the affidavit appended, were filed in the office of the secretary of state, &c. In this case, the articles subscribed by the defendant were never filed; and this is the distinction taken by the defendant's counsel, who cited *Troy and Boston Rail Road Co. v. Tibbits*, (18 *Barb.* 298,) and it is supposed to be controlling in this case. In that case, the action was not founded upon a subscription to articles of association, but upon a preliminary paper, contemplating the formation of a rail road company and the election of directors, and containing divers conditions or special provisions. Some six months thereafter, articles of association were prepared, and the de-

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fendant, with others, subscribed them, agreeing to take an amount of stock, much less than the amount specified in the paper upon which the action was brought. I have no doubt of the correctness of the decision in that case, that the defendant was not liable, and for the reasons assigned by Justice Wright, in his opinion, (*p. 306 et seq.*) The learned justice, however, regarded it as important, if not necessary, to examine the provisions of the general rail road act, (1848,) touching the organization of corporations under it. The plaintiff in that case was organized under that act. In 1850, the legislature enacted what is now the general rail road act, and the plaintiff in the present action was organized under it. There is, perhaps, no difference in the two acts, touching the precise question presented in this case, though the modes of proceeding are somewhat different.

By the act of 1850, persons not less than twenty-five in number, may form the company, and for such purposes may make and sign articles of association, in which shall be stated the name of the company, &c. and the names, &c. of thirteen directors. Each subscriber to such articles is to subscribe his name, place of business, and the number of shares of stock he agrees to take in said company. The articles of association may be filed, upon complying with certain provisions of the act, in the office of the secretary of state, &c. "and thereupon, the persons who have so subscribed such articles of association, and all persons who shall become stockholders in such company, shall be a corporation," &c. It is declared that "such articles of association shall not be filed and recorded in the office of the secretary of state, until at least \$1000 of stock for every mile of rail road proposed to be made, is subscribed thereto, and ten per cent paid thereon in good faith," &c.; nor until there is inclosed or annexed thereto an affidavit of certain facts. (*Sess. L. 1850, 211, §§ 1, 2.*)

Section 4 authorizes the directors, when the articles, &c. are filed, to open books of subscription for further stock, in case the whole capital stock has not been subscribed. The de-

fendant was not a subscriber for stock upon any book of subscription opened after the corporation came into being. If he is liable at all, he is so, as one of the persons acting in the formation of the company. He subscribed one set of the articles of association, but these articles were never filed; others, precisely similar, were filed with the required affidavit annexed. Did the defendant become a corporator?

The persons who are authorized to form the company are authorized to make and sign articles of association, and then, upon complying with the provisions of the second section, "such articles of association may be filed in the office of the secretary of state, who shall indorse them on the day they are filed, and record the same in a book, to be provided by him for that purpose; and thereupon the persons who have so subscribed such articles of association, and all persons who shall become stockholders in such company, shall be a corporation by the name specified in such articles of association," &c. Let us now read the second section. "Such articles of association shall not be filed, &c., until at least \$1000 of stock for every mile of road proposed to be made, is *subscribed thereto*, &c., nor until there is indorsed thereon or annexed thereto, an affidavit of certain facts. It is quite clear that there must be \$1000 of stock per mile, subscribed to the articles of association filed; and it is also entirely clear that those persons who have subscribed stock to the articles filed, become corporators and form a corporation. Are those who have signed articles of association not filed, and before any are filed, and which are copies or duplicates of those filed, excluded as members of the corporation? or, in other words, are they liable to the corporation upon such subscription? I propose to examine the cases cited by the plaintiff's counsel, before I express an opinion upon the question presented. In *Stanton, president of the Albany Exchange Bank, v. Wilson*, (2 Hill, 153,) the defendant subscribed stock to the original articles of association, which were used in organizing the banking association, in the manner provided by the statute.

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The action was upon the subscription, and in the name of Stanton as president, and the question decided was that the action could be maintained in the name of the president. The court refer to §§ 15, 16 and 21, of the act authorizing the business of banking. (*Laws 1838, ch. 260.*)

In the *Hamilton and Deansville Plank Road Co. v. Rice*, (7 Barb. 159,) the action was upon a subscription to the capital stock, made in one of several books opened and used for that purpose. Articles of association were subsequently adopted and subscribed by a large number of those who had subscribed on the books, but not by the defendant. The company was duly organized, and the defendant was put down upon the books as a stockholder, and a certificate of stock was delivered to him and he accepted it. The provisions of the general plank road act, (*Sess. L. 1847, 216,*) are very similar to the provisions of the general rail road act of 1848, which Justice Wright had under consideration in the case in 18 *Barbour*.

The statute authorizes the opening of books for subscription to the stock, and when a sufficient amount is subscribed, the subscribers may elect directors, "and thereupon they shall severally subscribe articles of association, in which," &c. "The articles of association may, on complying with the provisions of the next section, be filed in the office of the secretary of state; and thereupon, the persons who have so subscribed, and all persons who shall, from time to time, become stockholders in such company, shall be a body corporate," &c. Numerous questions were raised in the case, and considered in the opinion of Gridley, justice, having relation to the form of the promise, the consideration for it, and the non-existence of the corporation at the time it was made. Upon the question which it is supposed is like the one we are considering, he says: "A subscription to any legal and valid instrument by which a party engages to become a member of the company when organized, and to pay a given sum which is to be a part of the capital stock, followed up by an acceptance of a

certificate for stock, will make such subscriber a member of the corporation. The acceptance of the stock certificate is a waiver of any informality that may have intervened, short of an absolute defect of jurisdiction."

Justice Wright, in *Troy and Boston Rail Road Co. v. Tibbits*, (18 Barb. 308,) refers to this case, and distinguishes it by the remark, that a controlling feature of the decision was that the defendant, though subscribing before, after the organization of the company, had received from the plaintiffs and accepted a certificate of stock. The question we are considering was not involved in *Schenectady and Saratoga Rail Road Co. v. Thatcher*, (1 Kern. 102.) In that case the defendant was a subscriber to the articles of association filed in the office of the secretary of state. In *Eastern Plank Road Co. v. Vaughan*, (20 Barb. 157,) the form of the promise was to Boyd and Wood, and Boyd and Wood were authorized "to transfer the subscription to a company hereafter to be formed for the purpose of building said road." Boyd and Wood transferred the subscription of the defendant and others to the plaintiff. The judge, in his opinion, says that, as he understands the proof, the original subscription of the defendant was delivered to the plaintiffs, and the defendant's name subscribed to the books by Boyd and Wood, and adds: "If Boyd and Wood were the lawfully appointed agents of the defendant for the latter purpose, and the subscription would seem to confer that power, then such subscription in the books of the company is binding and obligatory upon the defendant, and he is a stockholder of the corporation to all intents and purposes, and is as much bound as though he had signed the articles of association with his own hand."

It is true the learned justice proceeds to discuss the case on other grounds, and expressed the opinion that the defendant was liable upon the contract or subscription made by him upon its simple transfer to the plaintiff. The principal question considered related to consideration. I may refer to that case hereafter.

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The next case cited by the counsel is *The Poughkeepsie and Salt Point Plank Road Co. v. Griffin*, (21 Barb. 454.) In that case the defendant signed the agreement to take and pay for stock, before the organization of the company, but did not sign the articles of association. He was held liable; the opinion of the court being by S. B. Strong, J. and Brown, J. dissenting.

The question under consideration was not included in the *Ogdensburgh &c. Rail Road Co. v. Frost & Spriggs*, (21 Barb. 541.) Nor in *The Rensselaer & Washington Plank Road Co. v. Barton*, reported in a note, 16 N. Y. Rep. 457. In that case the defendant subscribed to the articles of association which were filed, and thus used in creating the corporation.

I have thus noticed all the cases cited by counsel; and it must be confessed that they aid us very little in coming to a conclusion upon the question presented. Most of these cases arose under the plank road act, and the case in 18 Barb. in which Justice Wright gave construction to the general rail-road act of 1848, arose under that statute. The general plans for forming corporations under the plank road act of 1847 and the rail road act of 1848, are very similar. They seem to contemplate subscriptions to stock and the election of directors previous to subscribing articles of association, which are to contain the names of the directors. In the plank road act, the subscribers may elect directors, "and thereupon they shall severally subscribe articles of association." These articles may be filed in the office of the secretary of state, "and thereupon, the persons who have so subscribed, and all persons who shall from time to time become stockholders in such company, shall be a body corporate," &c. By the general rail road act of 1848, when a specified amount of stock is subscribed &c. the subscribers may elect directors, "and thereupon they shall severally subscribe articles of association." These articles may be filed in, &c. "and thereupon the persons who have so subscribed, and all persons who

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shall from time to time become stockholders in such company, shall be a body corporate," &c. Justice Wright, in *Tibbits' case*, was of the opinion that no one could become a corporator and stockholder in a rail road company unless he subscribed the articles of association, or subscribed for stock after the company was incorporated; and the corporation could only require payment from a stockholder. This case was decided in 1854. It is evident from the opinion of Justice James in *Eastern Plank Road Co. v. Vaughan*, (20 Barb. 155,) decided in 1855, that he did not regard it as necessary that the articles of association should be signed by the defendant, but that he might be liable upon a promise to take and pay for stock, made before the corporation came into being, provided it rested upon a good consideration. He takes no notice of Justice Wright's exposition of the statute, though he refers to the opinion for another purpose. In *Griffin's case*, (*supra*, 21 Barb. 454,) decided in 1856, it was expressly decided that an agreement to take and pay for stock in a plank road company, executed prior to the organization of the company, was operative and binding, although the subscriber never signed the articles of association. Justice Strong refers to *Tibbits' case*, and disapproves of the position that a subscription preliminary to the articles of association is not essential, and expresses the opinion that under the plank road act such preliminary subscription is a necessary and indispensable part of the machinery for the construction of the corporation; that it is something substantial, and upon the adoption of subsequent measures becomes a legal entity. He answers the objection of a want of consideration, that those who subscribe the preliminary paper acquire certain rights; they elect the directors, and have the privilege, which cannot be denied them, to form and subscribe the articles of association and thus form the company. He does not specially notice the language of the statute, that "the persons who have so subscribed (that is the articles) and all persons who shall from time to time become stockholders

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in such company, shall be a body corporate." If, however, the case was properly decided, it is an authority for holding the defendant liable in this case, as will in a moment be seen. Let us first turn to the general rail road act of 1850, under which the present case arises. By this act the preliminary subscription is dispensed with, and the persons forming the company make and sign articles of association in which shall be stated the name of the company, the names of thirteen directors, the amount of stock, not less than \$10,000 a mile, and many other things. And on complying with the provisions of the second section, such articles of association may be filed in the office of the secretary of state, "and thereupon the persons who have so subscribed such articles of association, and all persons who shall become stockholders in such company, shall be a corporation," &c. The second section prohibits the filing of such articles until at least \$1000 of stock for every mile of rail road proposed to be made is subscribed thereto, &c. In the present case Owen, the defendant, actually signed the articles of association, in which the thirteen directors were named. The copy articles signed by him were not filed. Articles exactly in all respects like those subscribed by the defendant and upon which a sufficient amount of capital had been subscribed, and a sufficient amount of per centage had been paid, to meet the requirements of the statute, were taken and duly verified and filed, and thus the corporation came into being. I repeat, if *Griffin's case* was properly decided, I do not see why the defendant in this case is not liable. But my difficulty consists in making the defendant a corporator under the statute; and the learned justice, in *Griffin's case*, does not meet this difficulty. As I understand the statute, only those who have subscribed the articles of association *that are filed* become corporators and constitute the corporation, and those who subsequently subscribe stock in the books opened by the directors for that purpose. The statute speaks of *such articles* of association, that is, the articles that have been filed, and

of the persons who subscribed them being a corporation. The case of *Mason*, (16 *N. Y. Rep.* 451,) does not help us a particle, for in that case the articles subscribed by the defendant were filed, and the defendant was clearly a corporator. Justice Wright, in *Tibbitts' case*, takes notice that it is the *stockholders* from whom the directors are authorized to require payment, and cites § 9 of the act of 1848. I see that by § 7 of the act of 1850, the directors may require the subscribers to the capital stock to pay the amount subscribed. But I do not think this change in the language is sufficient to affect the question. The defendant was not a subscriber for stock after the company organized. He proposed to be one of the corporators, an original member of the corporation, and unless he became such he is not, in my opinion, liable. He is not liable upon any common law notion of contract. If liable at all, his liability must be found in the statute. At the time he entered into the engagement no corporation existed. There is a class of cases where an individual enters into a contract with an existing corporation or with individuals, and in such cases the contract may be governed by common law principles. Such was the case of *The Trustees of Hamilton College v. Stewart*, (1 *Comst.* 582.) But in the class of cases arising under special statutes, which create the liability, the case must be brought within the statute; and when it is, the common law principles touching *consideration and parties* to the contract at the time it was made, have little to do with the case. The liability is a statutory liability. As I understand the statute, in the present case, there are two modes in which a subscriber to stock may become a member of the corporation or a stockholder. One mode is by subscribing the articles of association and becoming a member of the corporation, as provided in sections 1 and 2; and the other is by subscribing to the capital stock in the book opened by the directors, after the corporation is in existence. Now if the defendant did not become a member of the corporation—if he was not one of the original corpora-

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tors—he is not, in my opinion, liable. And I am of the opinion that no one who has only signed articles of association before the corporation came into being, is a corporator or a member of the corporation, unless the articles so subscribed by him have been filed as required by the statute. By omitting to file the articles subscribed by the defendant, the corporators have rejected him as a proposed member of the corporation, and have no claims upon him.

It is not necessary to inquire whether, had he complained, he had rights which would have been protected. The judgment must be affirmed.

[ERIE GENERAL TERM, November 12, 1860. Marvin, Knox and Grover, Justices.]

HUNTLEY, receiver &c., vs. MERRILL.

A policy of insurance against fire, issued by a mutual insurance company, is not void because it is, by its terms, to extend beyond the time limited by the charter of the company, for its corporate existence.

An insurance made by a mutual insurance company created by the laws of this state, upon property situated in the state of Pennsylvania, when the contract is made by the company itself, at its office here, is not void as being in violation of the laws of Pennsylvania.

A mutual insurance company may effect insurances upon property in Pennsylvania, without the intervention of an agent located there, provided the contract be made by the company itself, at its office here. And in such a case the proviso in the statute of Pennsylvania, passed in 1849, requiring every agent of a foreign insurance company to file in the office of the secretary of state a duplicate copy of his appointment, has no application.

MOTION for a new trial upon exceptions first heard at a general term.

D. H. Balls, for the plaintiff.

A. G. Rice, for the defendant.

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By the Court, MARVIN, P. J. The action was upon a premium note, made by the defendant to the Cattaraugus County Mutual Insurance Company, of which company the plaintiff had been duly appointed receiver. The property insured was in Bradford, McKean co. Penn., and the defendant resided there, and all the negotiations touching the insurance and note were had at Bradford, by the defendant, with one McKay, who was authorized by the company to make surveys and receive applications for insurance. McKay had no power to ratify or approve applications, or issue policies, or make contracts of insurance. He was furnished by the company with blank applications and premium notes, and the defendant employed him to make the survey and fill up the application, and to transmit them and the note to the office of the company at Ellicottville, in this state. They were so transmitted, and the company approved the application and sent the policy, by mail, to the defendant. The defendant put in evidence the charter of the company, and also a statute of Pennsylvania, passed in 1810, declaring that "no body politic or corporate of any foreign state, kingdom or country, &c., by themselves or any agent or agents of such company &c. shall be insurers in any case within this state against loss at sea, or against loss by fire, upon any property within the same; and all contracts and policies entered into by any such company &c. shall be null and void." The defendant also proved an act of the legislature of Pennsylvania, passed in 1849, enacting that "any mutual fire insurance company chartered within any of the adjoining states, for the purpose of insuring detached buildings and their contents, whose capital &c. can and may have an agency or agencies, and can and may become insurers in any case whatever, (except within certain specified limits,) legitimately appertaining to their business, and not contrary to the laws of this commonwealth. Provided, that every agent of such association or company shall file in the office of the secretary of this commonwealth a duplicate copy of his appointment, under the common or

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corporate seal of such company." McKay had never filed any duplicate copy of any appointment as agent.

The defendant's counsel requested the court to direct a verdict for the defendant. Refusal and exception. He then made, and now makes, the points; 1st. That the policy was void because it was to extend beyond the time limited by the charter of the company, for its corporate existence. Also, 2d. That the contract was void as being in violation of the laws of Pennsylvania.

The counsel also requested the court to charge, that the plaintiff was entitled to recover only the amount of the assessment made upon the note. Refusal and exception. The court directed a verdict for the plaintiff, and the defendant excepted.

The first question made was decided in this district, in *Huntley, receiver, v. Beecher*, (30 Barb. 580,) against the position of this defendant.

I am inclined to think that *Hyde v. Goodnow*, (3 Comst. 266,) disposes of the second question. In this case, as in that, the contract was made at the office of the company in this state. In that case the statute declared "no policy of insurance of any description, or for any purpose, shall be signed, issued or delivered in this state, nor on any property of any kind situated in this state, by any association, company or corporation not chartered by the laws of this state, except &c.," and the statute made null and void all policies &c. made contrary to its provisions. The case was not within the exception contained in the statute. The plaintiff was permitted to recover, as the contract was made in this state.

But I think there is a conclusive answer in the present case. The act of 1849 enables mutual fire insurance companies of adjoining states to have an agency or agencies in Pennsylvania, and to "become insurers in any case whatsoever," (except within certain places,) legitimately appertaining to their business, and not contrary to the laws of the common-

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wealth. Then follows the provision requiring the agent to file a duplicate copy of his appointment.

In the present case the company had not appointed any agent to make insurance. It had no agency. The company made the contract itself, at its own office, and the statute authorized the company to become an insurer. The proviso has no application, unless the company establishes an agency. It may transact its own business, without any agent, and its contracts will be valid, being authorized by the act; thus removing the disability created by the act of 1810, in the case of mutual insurance companies.

The remaining question raised by the defendant's counsel is overruled by the terms of the statute under which the company was organized. If a member neglects so to pay the sum assessed to be paid by him for thirty days, a suit may be brought and the whole amount of the deposit note may be recovered. The statute declares what shall be done with the amount. I know of no law by which the whole amount of the note is not to be recovered in the case of an action upon the note alone, and against the maker only. I will not now inquire whether, in those cases where the corporation has become insolvent, or its charter has expired, proceedings, other than separate actions against each defaulting member, could not be had, that would result in a final disposition of the matters involved, and in collecting from each defaulting member the amount equitably due from him.

The motion for a new trial must be denied, and there must be judgment for the plaintiff.

[ERIE GENERAL TERM, November 12, 1860. *Marvin, Knox and Grover*, Justices.]

WOODFORD vs. PATTERSON & GRANGER.

In the spring of 1858 A. purchased of the plaintiff a boiler, and gave his note, or promise in writing, to pay the plaintiff therefor, 40,000 feet of lumber, to be delivered on the 1st of September thereafter, on the bank of the Alleghany river, at a place specified. He manufactured certain lumber and put it up, at his mill, a few miles from the river, in four piles. He marked the plaintiff's name on the piles, and informed the plaintiff that the boards were sawed. In October the plaintiff and A. went to the piles, and A. pointed them out as being the lumber of the plaintiff, and told him they were his, and that they were marked to him; that if the plaintiff would draw the boards to the river he, A., would pay him for the drawing. The plaintiff agreed to take the boards where they then were, in payment for the boiler, instead of on the bank of the river, and to draw them himself. *Held*, that the original contract was not within the statute of frauds, and A.'s promise would have been good, had he given no note. That such contract was a special agreement for the payment of a debt in specific articles.

Held, also, that the transaction between the parties, in October, amounted to a delivery of the lumber to the plaintiff, in performance of the contract. That the title passed to the plaintiff, and he was entitled to hold the lumber, as against parties claiming the same by a subsequent purchase from A.

A PPEAL from a judgment entered on a verdict. Exceptions taken on the trial.

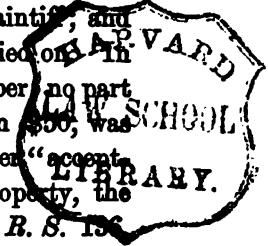
Henderson & Wentworth, for the plaintiff.

D. H. Balls, for the defendants.

By the Court, MARVIN, J. The action was for converting a quantity of pine boards, in Cattaraugus county, manufactured by one James Appleby, from whom the parties respectively claimed title by purchase. The principal question arose thus: Appleby purchased of the plaintiff, in the spring of 1858, a boiler, and gave to him his note or written promise to pay the plaintiff, for the boiler, 40,000 feet of lumber out of the first made at his mill; to be delivered on the 1st of September then following, on the bank of the Alleghany river, at a place specified. He manufactured the lumber in question, and put it up at his mill, a few miles from the river,

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in four piles; and the evidence proved, or tended to prove, that he marked the name of the plaintiff on them, and that he informed the plaintiff that the boards were sawed. In October the plaintiff was at the mill, and he and Appleby went to the piles, and Appleby pointed out the piles as the lumber of the plaintiff, and told him that the boards were his, and that they were marked to him. Appleby told the plaintiff if he would draw the boards to the river he would pay him for the drawing. The plaintiff agreed to take the boards where they then were, in payment for the boiler, instead of on the bank of the river, and draw them himself. The defendants claimed title by purchase from Appleby, subsequent to October, when the plaintiff agreed to take the lumber at the mill. The defendants moved for a nonsuit, which was denied, and they excepted. There were exceptions also to the charge of the court; the charge being, in effect, that if the facts were as claimed, from the testimony of the plaintiff's witnesses, or as such testimony tended to prove, then sufficient was done by the parties to vest the title of the lumber in the plaintiff. Did the title of these four piles of lumber vest in the plaintiff? It is supposed that the statute of frauds is controlling, and that enough was not done to transfer the title from Appleby to the plaintiff, and *Shindler v. Houston*, (1 Comst. 261,) is much relied on. In that case there was a bargain made for certain lumber, no part of the purchase money, amounting to more than \$50, was paid; and as stated by Gardiner J., unless the buyer "accepted and received" the whole or a part of the property, the contract was void by the statute of frauds. (2 R. S. 136 § 3.) The statute makes void every contract for the sale of goods &c. for the price of \$50 or more, unless a note or memorandum of such contract be made in writing &c.; or unless the buyer shall accept and receive part of such goods &c.; or unless the buyer shall at the time pay some part of the purchase money. In *Shindler v. Houston*, nothing occurred between the parties but mere words, and they constituted a part



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of the contract of sale, and it was held that they were not sufficient evidence of a delivery and acceptance; that the statute calls for acts.

The statute undoubtedly requires that there should be a delivery by the vendor, with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intent of taking possession as owner; and to satisfy this rule, something must be done, subsequent to the sale, unequivocally indicating the mutual intention of the parties.

The words of the statute are "accept and receive," and this language imports some *act done*, aside from the mere verbal contract of sale. I am speaking, of course, of a case where the contract is void unless the buyer shall "accept and receive" part of the goods. Now if the case we are considering is to be controlled by the statute, was there not enough done to satisfy it? The parties went upon the piles of lumber, and the vendor said in effect to the vendee, "Here is the lumber designed for you—that I agreed you should have—and I have marked it off to you; these four piles are yours." And the vendee in effect says, "I agree to take them; I accept them as they are, marked with my name." Does not all this amount to something more than mere words? But this is putting the case on grounds quite too narrow. The statute relates to *contracts* for the *sale* of goods, &c. In this case the parties did not negotiate about a *sale* of the lumber, nor do any act in reference to a sale. Appleby had, in April previous, given to the plaintiff his note or contract, by which he promised to pay the plaintiff, for the boiler, a certain quantity of boards out of the first he should make at his mill, and deliver them at a place named. He made the lumber in question intending it for the plaintiff. Had he drawn and delivered the boards in time, at the place named in the contract, the plaintiff would have been bound to accept them in satisfaction of Appleby's undertaking. If he should refuse to receive them, a tender by Appleby would discharge his obligation.

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The lumber had not been delivered in September, as agreed, but the plaintiff was still willing, in October, to receive it upon the contract, and was also willing to waive or change that part of the contract relating to the place of delivery, and accept the lumber where it then was. Suppose at that time the plaintiff had delivered to Appleby the note, and the parties had entered into a written agreement, by which the plaintiff had undertaken to draw the lumber to the river, and Appleby had undertaken to pay him therefor, would any one have doubted that the title of the lumber had vested in the plaintiff, and that Appleby had paid his debt? And yet it was not necessary that the note should be surrendered, and a verbal contract for the drawing of the lumber was as valid as though in writing. It seems to me that we are to look elsewhere than to the statute for the law applicable to this case, viz: to the law relating to special contracts for the payment of a debt, in specific articles, and also the law relating to a waiver of strict performance. The statute relates to contracts for the sale of goods, &c. for the price of \$50 or more, and is applicable to executory contracts. (*Bennett v. Hull*, 10 John. 364.) In this case the contract was made when the plaintiff sold and delivered the boiler to Appleby, and the latter gave to the plaintiff the written contract to pay in lumber. On the part of the plaintiff the contract was executed by his paying the consideration, and Appleby's promise was evidenced by the note; so that if it should be regarded as a present purchase of the lumber, to be delivered at a future day, the buyer paid the consideration at the time, and in this view the contract between the parties would be valid, if there had been no written promise to pay. In short, the contract by which the plaintiff sold and delivered the boiler to Appleby, the latter promising to pay therefor in lumber, was not within the statute, and Appleby's promise would have been good had he given no note. The question therefore comes back to what was done in October at the mill, and that related to the performance of the agreement made in April, and in

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my opinion, by the rules of the common law the evidence was sufficient to show a delivery of the lumber in performance or part performance of the contract, or indeed of a common law sale. (1 *Parsons on Cont.* 435.) If so, the title passed, and the property was at the risk of the plaintiff.

The judgment must be affirmed.

[EXRE GENERAL TERM, November 12, 1860. *Marvin, Davis and Grover*, Justices.]

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Where the powers conferred upon a municipal corporation, in respect to streets and side-walks, are specified in its charter, and such powers are merely *discretionary*; no absolute and imperative duty to repair the side-walks being imposed upon the corporation; such corporation is not liable in damages to an individual, for injuries sustained in consequence of the defective condition of a side-walk.

Before an action will lie, at the suit of an individual sustaining peculiar damages, against a municipal corporation, for an omission to perform a duty enjoined by law, it must be shown that the duty has been imposed *absolutely* and *imperatively*, and does not rest in *discretion*.

The case of *Cole v. The Trustees of the Village of Medina*, (27 Barb. 218,) re-affirmed.

MOTION to set aside a nonsuit, granted upon the opening of the plaintiff's counsel, and for a new trial.

The material facts, as stated in the opening, were, that the defendant was a village corporation; that Mechanic's street was within the bounds of the corporation; that a plank side-walk had been constructed along said street, for the use of foot passengers; that there was, and had been for some time prior to October 5th, 1859, a large hole or excavation in said walk, at a place specified, caused by the removal or displacement of one of the planks; that the plaintiff, while passing over said side-walk in the discharge of his ordinary business, accidentally, and without any fault or negligence on his part,

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stepped or fell into said hole or excavation, and was thereby violently and seriously injured, &c. By means, &c. The court nonsuited the plaintiff, and he excepted.

H. Wilbur; for the plaintiff.

James M. Willett, for the defendant.

By the Court, MARVIN, J. It is claimed by the defendant's counsel that this case is controlled by *Cole v. The Village of Medina*, (27 Barb. 218,) decided in this district. The plaintiff's counsel has attempted to show a distinction in the cases, and also insists that the decision at the circuit is in conflict with certain recent decisions of the court of appeals, to be hereafter noticed. It will be proper to bring into view all the statute law having a relation to the question we are to consider. By the act of April 9, 1853, (*Laws of 1853*, ch. 140,) "the village of Batavia" was incorporated. There were to be five trustees. By section 9, title 4, it is declared that the trustees shall have power to cause the side-walks, on the streets and highways in said village, to be leveled, raised, graveled, flagged and repaired, and ornamented with trees; and to compel the owners or occupants of any lands or lots adjoining such side-walks, to make such improvements upon such side-walks as aforesaid, and to determine and prescribe the manner of doing the same, and the materials to be used thereon, and the quality of such materials; in case the owner or occupant of such land or lots shall neglect or refuse to complete such required improvements, within such reasonable time as may be required by the trustees, the trustees may cause such improvements to be made and completed, and the expenses thereof may be then assessed upon such owner or occupant, and added to the next annual village tax upon said land or lots; or the trustees may direct the collection of the same by suit against the owner or occupant. By sec. 1, tit. 6, it is declared that the village shall constitute a highway district,

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and the powers and duties of commissioners and overseers of the highway are devolved upon and shall be exercised by the trustees of said village, subject to certain provisions thereafter contained. By sec. 2, power is conferred upon the trustees to appoint a superintendent of highways for the village, who shall possess all the powers and perform all the duties which overseers of highways possess and may perform, and he is to be subject to the direction and control of the trustees. By section 3, it is declared that the trustees shall have power to make, maintain, keep in repair, and from time to time cleanse all necessary drains and sewers in the streets and alleys in said village, and defray the expenses thereof out of the highway taxes. By section 5, the trustees have power to level and grade the streets and alleys of the village, and to establish and alter the grades, &c. By section 2, title 7, it is declared that the trustees shall have power to assess, levy and collect by tax upon the taxable inhabitants and property in said village, annually, such an amount denominated highway tax, as they shall deem necessary, not exceeding certain sums specified. The money is to be expended upon the streets, highways and bridges in said village, and as otherwise by the act authorized and directed; that is, by section 4, title 6, a portion of such tax, not exceeding one fourth, may be expended on highways leading to and from the village.

I think I have referred to all the provisions of the statute which can be claimed as having any relation to the question to be considered. It is seen that the statute contains special provisions relating to side-walks. The tax is a local tax, and there is no power to make it general "upon the taxable inhabitants and property in said village," as in the case of highway taxes. It is nowhere made the duty, *imperative* or *discretionary*, of the corporation, to make and repair the side-walks. Certain powers, relating to side-walks, are conferred upon the trustees. These powers are discretionary. No absolute and imperative duty is imposed. The case comes clearly within the decision in *Cole v. The Trustees of Medina*,

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and the cases there cited. That case was decided at the May general term, 1858, and it is supposed that certain decisions made by the court of appeals, commencing with *Hickok v. The Trustees of the Village of Plattsburgh*, reported in a note to *Conrad v. The Trustees of the Village of Ithaca*, (16 N. Y. Rep. 158,) decided at the September term, 1857, are inconsistent with the decision in *Cole v. The Trustees of Medina*, and that such decision is therefore no longer authoritative. In the principal case, *Conrad v. The Trustees of the Village of Ithaca*, the corporate name of the village was, "The trustees of the village of Ithaca." By the act, the trustees were made commissioners of highways. They constructed a bridge within the village, and with its funds, in a manner so negligent and unskillful, that by means thereof the plaintiff's building was carried away during a freshet. It was held that the building of the bridge was a corporate act; that the powers given to the trustees, as commissioners of highways, vested in them, not as individuals or as independent officers, but as a part of the municipal power of the corporation, for the benefit of which they were to be exercised, and that the corporation was therefore responsible for their acts and omissions in that capacity. The building of the bridge was regarded as a corporate act, and the action was treated as one against the corporation; and so regarding the act and the action, there was ample authority for holding the corporation liable for the damages sustained by reason of its negligence and unskillfulness in erecting the bridge. (See *The Rochester White Lead Co. v. The City of Rochester*, 3 Comst. 483.) Denio, Ch. J. in his opinion, refers to *Hickok v. The Trustees of the Village of Plattsburgh*, decided at the June term, 1856, but not reported, and says: "The question was whether the trustees of a village, in respect to their functions as commissioners of highways, are to be regarded as the agents of the corporation in such a form as to make the latter responsible for their acts or omissions, according to the law of master and servant; and that the decision of the court was, that the corporation

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was liable for the negligence of the trustees in their functions of highway commissioners. It appears, from Judge Denio's opinion, that the trustees neglected to fill up a ditch which a wrongdoer had excavated in the street; and he adds: "It was held to be a corporate duty to keep the street in a safe condition." The reporter, in a note, refers to *Hickok v. The Trustees of the Village of Plattsburgh*, and says that an opinion of Justice Selden, in the case of *Weet v. The Trustees of the Village of Brockport*, delivered by him while upon the bench of the supreme court, was read and adopted as a correct exposition of the principles governing in actions of this character, and published such opinion as a note. The action was against the corporation, its name being "the trustees of the village of Brockport." The trustees undertook to construct a platform to connect the corner of the canal bridge with the side-walk. It was partially constructed and left over night in an unfinished and dangerous condition, by reason of which the plaintiff, without fault, was injured. The plaintiff was nonsuited, on the ground that the action would not lie against the corporation, but that it must be against the trustees individually, as commissioners of highways. The nonsuit was set aside, and Justice Selden, at special term, delivered the opinion in question, holding that the act was a corporate act, creating a nuisance, and citing *The Rochester White Lead Co. v. The City of Rochester*, (3 Comst. 463,) and *Lloyd v. The Mayor &c. of the City of New York*, (1 Seld. 369.) He recognizes and asserts the well settled principle, that whenever a corporation assumes to exercise its powers, it is bound to see that due care and caution are used to avoid injury to individuals. It is, of course, responsible for its negligence and want of care, as an individual would be. The learned justice considered the question whether town commissioners of highways, in this state, are liable to a civil suit for the neglect of their duty to keep the highways and bridges of their towns in repair. He discussed the question with great ability, and comes to the conclusion that they

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are not; a conclusion in which I most fully concur. And I may add, that I think the opinion has settled the doubts existing, to some extent, upon the question arising from some previous dicta and decisions, especially *Adsit v. Brady*, (4 Hill, 630.) Much of the opinion is devoted to the consideration of the liability of corporations, and the grounds upon which they are held liable for damages in actions instituted by individuals. If I understand the learned justice correctly, he educes the obligation and duty, on the part of the corporation, to individuals, from a contract supposed to be entered into by and between the public and the corporation, the consideration for which consists in the franchises, powers and privileges granted by the state to the corporation.

I am somewhat in doubt whether the learned justice intended to maintain the position that all powers of a public nature, conferred upon a corporation, raise the *duty* of exercising the power. Such a provision would be extremely comprehensive and sweeping in its operations. It would be only necessary to turn to any of the numerous charters incorporating the cities and villages in this state, and read the powers conferred, generally, upon the mayor &c. or trustees, to be exercised, in the language of the opinion in *Conrad v. The Trustees of the Village of Ithaca*, by them, "as the agents of the corporation in such a form as to make the latter responsible for their acts or omissions according to the law of master and servant." I am inclined to think that the learned justice did not intend to maintain such a position. It was not necessary to the decision of the case, nor to the position that the liability of corporations has its foundation in contract express or implied; nor do the cases cited by him inculcate such a principle. If the obligation arises out of contract, then we must, of course, ascertain what the contract is, and this at once presents the question of *construction* in all cases where the contract is to be found in the statute. In *Henly v. The Mayor &c. of Lyme*, (5 Bing. 91,) cited by the learned justice, the contract clearly appeared. It was contained in a grant made by the

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crown, and the court spoke of it as "the condition upon which the grant was made." By this condition the defendant was to repair and maintain certain sea banks and mounds. The plaintiff had a special interest in the performance of this condition, and sustained private damages in consequence of its breach by the defendant; and the question was whether he could maintain the action. It was insisted that the crown alone could take advantage of a breach of the condition of the instrument and letters patent. The court held the defendant as a corporation liable. In other cases referred to by the learned justice the contract appeared in the declaration. Thus in *Yielding v. Fay*, (*Cro. Eliz.* 569,) it was averred in the complaint that the defendant *was bound by custom* to keep a bull and boar for the use of the parishioners, the plaintiff being one of them, &c. See the other case referred to by Justice Selden, and his remarks, claiming that the liability rests upon contract. As I have already said, we must ascertain what the *contract is*, and see whether it raises a *duty*, public or private. I have always understood that when power is conferred upon a corporation, and an absolute and imperative duty to exercise the power is imposed, an individual who sustains a damage, peculiar to him, in consequence of the omission to exercise the power, may maintain an action; and that this rule applies to a large class of public officers. I have supposed that a distinction between duties judicial and discretionary in their nature, and those which are *imperative* was clearly established by the decisions in this state. (*See 1 Denio*, 595.) For the purpose of considering whether the duty is imperative we resort to *construction*, and take into consideration the nature of the case. Thus, I can understand why Lord Holt should have said, "if a ferry were granted at this day, he that accepts such grant is bound to keep a boat for the public good;" and again, "he that has a new ferry by grant, when he accepts it, charges himself with the repairs and keeping it." Again; the word *may* as

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used in a statute is sometimes, by construction, made to read *must*, thus creating a duty.

Now I admit the language of our statutes relating to highways and bridges, is sufficiently comprehensive to justify a construction raising an *imperative duty* on the part of commissioners of highways to cause the highways to be kept in repair. Indeed the reading of the statute is, that it shall be their duty to cause the highways and bridges to be kept in repair. (1 R. S. 508, § 1.) And yet, notwithstanding such injunction, it has been almost universally understood in this state, since the decision of *Bartlett v. Crowier*, (17 John. 438,) that no action would lie against commissioners of highways for an omission of the duty as enjoined in the statute. Chancellor Kent, as a member of the court for the correction of errors, discussed the question very elaborately, and went fully into the English law, in his opinion, from p. 451 to 461. After stating that there is no certain stable absolute duty in the case, he adds: "It is not like the case of an individual bound by a private statute, or by a certain tenure, to keep a road or bridge in repair, nor like the case of turnpike companies. There the duty is perfect, and binding at all times, and is founded on a valuable consideration. The roads and bridges must, at all events, be kept in repair according to ordinary diligence. It is a condition of the grant. The duty is not casual or contingent, but inevitable. In the case, however, of these commissioners and overseers, the duty depends upon a train of circumstances: it is very indefinite, and is varied and regulated by discretion. There is not that precision and certainty of duty that ought to make them responsible to individuals, to any extent, and for any damage. The law has not supplied them with pecuniary means, or armed them with coercive power requisite to meet and sustain such an enormous and dangerous responsibility." We here see the ground upon which the chancellor placed his opinion, and I shall have occasion to refer to this extract hereafter. I will here remark that he was giving *construction* to the statute, and

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he failed to discover in it any "certain, stable absolute duty" imposed upon the commissioners. He does not assign as a reason for their non-liability that they were not a corporation, having received a consideration in the grant of privileges and franchises in the form of *powers* to make and repair the highways. He does not intimate that they would not be liable, in a private action, by one peculiarly aggrieved, if the statute had imposed upon them a clear, certain, stable and absolute duty, and had furnished them the means of performing the duty. Now as I understand the state of the law as established in *Hickok v. The Trustees of the Village of Plattsburgh*, it is that an incorporated village, being a separate highway district, whose trustees are, by its charter, constituted commissioners of highways, or upon whom is devolved the powers and duties of highway commissioners, is liable in an action, by a private individual, for damages arising by reason of the defective condition of the streets and highways in such village; in other words, for the omission of the corporation (assuming it responsible for the omissions of its trustees) to keep in repair the streets and highways. And as I understand, this position is reached by giving to the statute an effect, when applied to a municipal corporation, not given to it when applied to town commissioners of highways, in reference to whom the statute was made. And this upon the idea that in the latter case there was no contract, founded upon a good consideration, between the state and the highway commissioners, that they should perform the duties enjoined in a general way in the statute; and in the former that such contract may be implied, having for its consideration "privileges of great value," and "franchises," conferred by the charter, and that for the breach of such contract an individual, sustaining damage, may maintain an action. It is not for me to question the soundness of this position. Indeed when a case arises in which it is in point, I shall of course follow it. But I may be permitted to say, with great respect for the very able and learned judge, upon whose

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reasoning the court proceeded, that his opinion has failed to satisfy my mind of the correctness of the position.

Why should the statute receive a *construction* different, when applied to a municipal corporation, from that given to it when applied to commissioners of highways? For, before the liability of either, to a private action, can be established, the duty, certain, stable and absolute, or in the language of some of the judges, absolute and imperative, not discretionary or judicial, must be found. When so found, either from the nature of the case, or from the construction given to a statute, the liability for a neglect to perform the duty may, in a proper case, exist. As I understand the cases referred to by the learned judge, they do not sustain the position upon which I am remarking. They contain no intimation that the same statute may be so construed as to impose an imperative duty upon a municipal corporation, in the form of a contract, where such duty would not exist when the same statute is applied to public officers. Nor do I find any such distinction in the English cases. I agree that by the common law, grantees of franchises, whether corporations or individuals, have been held to a strict performance of every condition of the grant, either express or implied; and that the grantee of a ferry is bound to keep and maintain a suitable boat, and the grantee of the right to erect a bridge or construct a turnpike road and take toll, to keep such bridge or road in repair, whether so expressed in the charter or not. And I consent that this obligation or duty arises out of contract founded on a valuable consideration. The grantees have the exclusive privilege of taking tolls, and the privileges conferred upon them are for the mutual benefit of themselves and the public. Chancellor Kent, in the opinion referred to, speaks of this class of cases. But the question constantly recurs, what are the duties imposed, and what are their character, imperative or discretionary? And what are the conditions of the grant, as expressed or implied? The duty sometimes arises out of a simple power, or authority to do a thing, and

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is declared to be absolute on account of its being of public concern and relating exclusively to public welfare. It was upon this principle that Ch. Justice Nelson based his opinion in part, in *The Mayor &c. of N. Y. v. Furue*, (3 Hill, 614;) adding, however, that if it should be conceded, that the exercise of the power, (making sewers &c.,) was in the first instance optional on the part of the corporation, yet having elected to act under it, they must be held responsible for a complete and perfect execution. In *Wilson v. The Mayor of New York*, (1 Den. 600,) the court refer to the case in Hill, and are careful to place it upon the latter position of Judge Nelson. And it is denied that from the power conferred to make sewers &c. any imperative duty arose, or could be inferred. In this case Judge Beardsley states very clearly the law in relation to liability, and, observe, the action was against a municipal corporation. He however intimates no distinction. He speaks of errors arising from confounding powers and duties, which, he says, are totally dissimilar. When the duty is absolute, certain and imperative, the delinquent officer is bound to make full redress to every person who has suffered by such delinquency. If the powers are judicial or discretionary, there is no liability to individuals. There is also a class of cases where the power, in form, as given in the statute, is permissive, as *may* do a certain thing, instead of *shall*, and the courts, in view of the subject matter, have so construed the statute as to create an *imperative duty*; as when the statute reads "the sheriff *may* take bail, it was construed, he *shall*, for he is compellable to do so." (See other cases cited by Nelson, Ch. J., 3 Hill, 615.) By the common law, in England, the duty of repairing bridges belonged to the county. By a statute of Henry 8, it was enacted that if a bridge was within any city or corporate town, the inhabitants thereof should make and repair it, and if not within any city or corporate town, then the inhabitants of the shire or county should make and repair it; and yet I think no case of a private action for damages can

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be found for a breach of such duty. The only remedy was by presentment, or an indictment. But when an individual or corporation was charged with the duty, under some condition of tenure, or prescription, then an action will lie at the suit of one having a peculiar interest in the performance of the duty, and who, by its breach, sustains damages peculiar to himself. Such was the case of *Henly v. The Mayor &c. of Lyme*. See, again, Chancellor Kent's opinion in *Bartlett v. Cronier*, (17 John. 452 *et seq.*)

If it be conceded that an action will lie at the suit of an individual, sustaining peculiar damages, against an officer or corporation, for an omission to perform a duty enjoined by law, it must of course be first established that the duty has been imposed absolutely and imperatively. So, I insist, are all the authorities. This of course brings us to the statute—our highway act—and I have said above, its general language might have been construed as imposing an imperative duty to cause the highways to be kept in repair. But in considering the entire statute, and the system it establishes, it was decided more than thirty years ago, that no such imperative duty was imposed. The question was elaborately considered by Chancellor Kent, in *Bartlett v. Cronier*, (*supra.*) And the views expressed by him have been concurred in and approved more than a fourth of a century, and I am not aware of any authority to the contrary. The case in 3 *Hill*, (*supra.*) had reference to the repairing of sewers, and many satisfactory reasons may exist for holding a city that has constructed sewers, bound imperatively to keep them in repair so that they shall not become nuisances, when such reason may not exist for holding a city, village or town, imperatively bound to keep the streets and highways in repair. Justice Selden, in *West v. The Trustees of the Village of Brockport*, held that town commissioners of highways were not liable, but that a municipal corporation to which the statute was applied might be liable. This latter position was not necessary to the decision of the case, as the case came clearly within *The*

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Rochester White Lead Co. v. The City of Rochester, viz. negligence in the execution of the work. But the court of appeals, upon the distinctions and reasoning of Justice Selden in *West's case*, did decide, in *Hickok v. The Trustees of the Village of Plattsburgh*, that the corporation was liable for its neglect to keep the highway in repair. Thus establishing, as I think, an entirely new precedent, and directly in conflict with the previous constructions of our highway statutes; and this too without any written opinion in the case, and upon an opinion in the other case, delivered at a special term, in which not a single provision of our highway statutes is referred to; and in which no notice is taken of *Bartlett v. Cronier*, (17 John. 452,) and in which no attempt is made to give construction to the various provisions of the highway statute, and explain the system, as a whole. It seems to me unfortunate that a decision so important as *Hickok v. The Trustees of the Village of Plattsburgh*, should have been given to the public in the form and manner it has been. The question whether our incorporated villages are liable in an action by an individual for damages arising from neglect to repair the streets and highways within its boundaries, when the village is a road district &c., is one of very great importance, and were it open to discussion, it seems to me that it would not be difficult to establish, upon principle and authority, that such corporations are not liable, and ought not to be liable, for damages in a private action; that in the language of Kent, "There is not that precision and certainty of duty that ought to make them responsible to individuals to any extent, and for any damage. The law has not supplied them with any pecuniary means, or armed them with the coercive power, requisite to meet and sustain such an enormous and dangerous responsibility." And I may add, as I said, in substance, in *Cole v. The Trustees of Medina*, I apprehend that very few of our villages would consent that an imperative duty should be imposed upon them to make or cause to be made, and kept in repair, their streets and side-walks, thus

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involving taxation to an unknown extent. The inhabitants and tax-payers are content that trustees elected by them should have certain *discretionary* powers over them, relating to streets, side-walks and a great variety of other matters. But it would be a great revolution to change these numerous discretionary powers into *absolute* ministerial *duties*, so as to make the corporation liable in an action for damages arising from any neglect to perform the specified work or act.

In the case under consideration it was a *side-walk* that was out of repair. The power given to the trustees, or the defendant, over this subject, is specified in the statute, and is clearly discretionary. It is independent of the powers and duties pertaining to commissioners of highways, as their powers and duties relate to highways and bridges, and not to side-walks in incorporated villages. I do not regard *Hickok v. The Trustees of the Village of Plattsburgh* as in point. But *Cole v. The Village of Medina* is. A new trial is denied, and judgment ordered for the defendant.

[ERIE GENERAL TERM, November 12, 1860. *Marvin, Davis and Grover*, Justices.]

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The act authorizing substituted service of subpoena and complaint to be made in certain cases, under an order of the court, where personal service cannot be made, (*Laws of 1853, p. 974*), requires that the judge who makes the order shall be *satisfied* that the defendant sought to be served resides in this state and cannot be served, for the reasons stated, before he can act in the matter; and *being satisfied*, he may make the order.

Such judge is, consequently, authorized and required to decide whether or not sufficient facts are shown to confer jurisdiction; and if he decides affirmatively, that question becomes *res judicata*.

After judgment has been obtained against a defendant, upon a substituted service, made under a judge's order, and supplementary proceedings have been commenced against the defendant, and proceeded with, without any objection being made by the defendant to the validity of the judgment; he

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appearing upon such proceedings, with his counsel; he cannot move to vacate the judgment on the ground that jurisdiction of his person had not been acquired, and that consequently the judgment was void.

UPON substituted service of the summons and complaint in this action, made pursuant to an order of a judge of this court, judgment was entered by default, in favor of the plaintiff, on the 3d of December, 1858, for \$437.92. In March, 1859, supplementary proceedings against the defendant Ryan were commenced, in which he appeared, with counsel, and such proceedings were continued from time to time, and proceeded with, until May 7, 1859, so far as appears, without objection to the validity of the judgment. On the 15th of March, 1860, the defendant Ryan moved, at a special term, to vacate that judgment, on the ground that jurisdiction of his person had not been acquired in the suit, and the judgment was consequently void.

From the papers read on the motion it appeared that, on an affidavit of George A. Moore, a deputy sheriff, sworn to on the 10th of November, 1858, and stating that he had made proper and diligent efforts to serve the summons and complaint on the defendants; that he had made inquiries at the residences of said defendants, as to where they were; that the families of the defendants, at such residences, stated they were not able to tell where the defendants could be found; that the residence of Ryan was at 248 West 26th street, in the city of New York, and the residence of the other defendant at No. 376 in 7th avenue in said city; and that by and after due and proper and diligent effort by him, the deponent, the defendants could not be found; an order, dated 10th November, 1858, was made by a justice of this court, that said summons and complaint be served by leaving copies thereof at the residence of each of said defendants, with some person of proper age, &c., and service was made accordingly. An affidavit of the defendant Ryan (not disputed) stated that on the 6th of September, 1858, he sailed from the city of New York, in company with the other defendant, for San Fran-

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cisco, in California, by way of the Isthmus of Panama, and arrived there on the 30th of September, or 1st of October, and remained in California until January 5, 1859, when he sailed for New York.

The motion was denied, and from the order denying it the defendant appealed.

By the Court, BONNEY, J. The defendants' counsel has very elaborately and ably argued that the affidavit of the deputy sheriff only shows that the defendant's residence or domicil, occupied by his family, was in New York; not that he personally was residing there, and as it is furthermore affirmatively shown that the defendant was actually absent from, and (as it is argued) consequently *not residing* in New York, within the meaning of the statute, no jurisdiction was acquired, to make said order of November 10th.

The statute under which the order was made (*Laws of 1853, p. 974.*) so far as applicable to this case, provides that whenever it shall satisfactorily appear to any judge of the supreme court, by affidavit of any deputy sheriff authorized to serve any process or paper for the commencement of any action, that proper and diligent effort has been made to serve such process or paper on any defendant residing in this state, and that such defendant cannot be found, so that the same cannot be made personally by such proper diligence and effort, such judge may, by order, direct the service of any summons &c. to be made, by leaving a copy thereof at the residence of the person to be served, with some person of proper age, &c.

As I understand and interpret this act, it requires that *the judge who makes the order for substituted service* must be *satisfied* that the defendant sought to be served resides in this state and cannot be served, for the reasons stated, before he can act in the matter; and *being satisfied*, he may make the order. Such judge is consequently authorized and required to decide whether or not sufficient facts are shown, to

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confer jurisdiction; and if he decides affirmatively, that question becomes *res judicata*. He may have misjudged, and acted upon insufficient evidence; and for that reason the order may have been erroneously granted, and might be, upon proper application, set aside; but it will not be void.

It is to be observed that this defendant does not allege or pretend that the whole amount of this judgment is not justly owing by him; nor state any equitable grounds for relief. He does not even deny that he was residing in New York, at the time this order was made, but merely states that he was absent from the state from the 6th of September, 1858, until (probably) the latter part of January, 1859, when he returned, and (as it appears from his examination) occupied the same house which the deputy sheriff stated to be his residence, and where his family was living when this summons and complaint were served. I think it may well be held that the defendant was residing in the state, within the meaning and intent of the statute, when this order for substituted service was made; but I prefer to decide the question on the ground first stated.

The order appealed from should be affirmed, with ten dollars costs.

[NEW YORK GENERAL TERM, November 5, 1860. *Sutherland, Bonney and Hogeboom, Justices.*]

 MORANGE vs. MORRIS.

When a question of law, only, is raised at the circuit, which is decided by the justice there presiding and disposes of the whole case, and the justice directs the finding of a verdict, and judgment is entered thereon, an appeal from such judgment, to the general term, may be immediately taken. Such a judgment is to be deemed entered upon the direction of a single judge, within the meaning of section 848 of the code.

WHEN this case was called for trial, at the circuit, the parties appeared, and the pleadings were read. No

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evidence was offered by either party. The questions raised by the pleadings were argued by counsel, and the court thereupon decided that the plaintiff was entitled to judgment upon the pleadings, for the amount claimed in the complaint, and directed the jury to find a verdict accordingly. To this decision and direction the defendant's counsel excepted. A verdict was then rendered, pursuant to such direction of the court, and judgment entered thereon; from which judgment the defendant appealed to the general term.

H. H. Morange, plaintiff, in person.

J. J. Glover, for the defendant.

By the Court, BONNEY, J. The plaintiff moves to dismiss the appeal, upon the ground that no motion has been made at a special term, for a new trial, and the judgment was not entered upon the direction of a single judge, in such a sense as to authorize an appeal.

The question raised by this motion has been several times presented incidentally to the court, and should be definitively disposed of. The code (§ 348) provides that an appeal *upon the law* may be taken, to the general term, *from a judgment* entered upon the report of referees, or *upon the direction of a single judge* of the same court, in all cases. This is an appeal upon the law, to the general term from a judgment, and in those particulars is certainly within the words of the statute. The only question is, was the judgment entered upon the direction of a single judge? The plaintiff insists that, although the only question to be determined between these parties was raised by the pleadings, and was a question of law, which was heard and decided by a single judge, presiding at the trial, who directed the finding of the verdict upon which the judgment was entered, yet the judgment was not entered by any judge, but by the clerk, pursuant to statute, (*Code*, § 264,) and that, to entitle him to appeal, the

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defendant must first move at circuit or special term, before the same or another single judge, for a new trial, and, if his motion is denied, appeal from the order made thereon.

This section (264) of the code provides that upon receiving a verdict the clerk shall enter it, in the manner specified, in his minutes, and enter, *either the judgment rendered thereon* or an order that the cause be reserved for argument or further consideration; and, if a different direction be not given by the court, he must enter judgment in conformity with the verdict; that if an exception be taken, it may then be reduced to writing and entered in the judge's minutes, and afterwards stated in a case or separately; and that the judge who tries the cause may, at the same term or circuit at which the trial is had, entertain a motion, on his minutes, to set aside the verdict and grant a new trial: and when such motion is heard and decided on the minutes, and appeal from his decision is taken, a case or exception must be settled in the usual form, for the argument of such appeal. By section 265 it is provided that a motion for a new trial, on a case or exceptions or otherwise, must, in the first instance, be heard and decided at the circuit or a special term, except that when exceptions are taken, the judge, at the trial, may direct them to be heard in the first instance at the general term, and that the judgment in the mean time be suspended. And when the case presents only questions of law, the judge may direct a verdict subject to the opinion of the court at general term; in either of which cases no judgment can be entered until the case has been heard at a general term.

The plaintiff in this case insists that the provisions of section 265 apply to all cases tried at the circuit; and that in all such cases a motion for a new trial must be made at circuit or special term, before an appeal from the judgment entered upon a verdict can be taken. In my opinion this is not the true construction of these provisions of the code. In the principal case there was no question of fact tried. The pleadings presented a question of law only, which was heard

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and decided by the court, who directed the verdict which was entered by the clerk, and judgment was entered thereon. And I think this judgment, in contemplation of law and also in fact, was entered upon the direction of a single judge; and, exception having been duly taken, that the decision of the judge, made thereon, may be reviewed at general term, on appeal, without further hearing of the same question before another single judge.

The conclusion at which I have arrived is, that when a question of law only is raised at the circuit, which is decided by the justice there presiding, and disposes of the whole case, and the justice directs the verdict, and judgment is entered thereon, an appeal from such judgment may be immediately taken. And the decision, as I think, is in conformity with the provisions of the code, and not in conflict with the decisions to which the plaintiff has referred.

In *Cobb v. Cornish*, (16 N. Y. Rep. 602,) questions of evidence, and other questions, arose and were decided at the trial, and exceptions taken to the decisions of the court thereon. The case was submitted to the jury on questions of fact, under instructions from the court. A verdict was found for the plaintiff; and the court ordered a motion for judgment, upon a case, to be heard in the first instance at a general term, and judgment in the mean time to be suspended. The general term heard the motion and rendered judgment for the defendant. The plaintiff appealed, and the court of appeals reversed the judgment as for a mis-trial, and ordered a new trial. The only question was whether the court below could order that case to be first heard at a general term, and judgment in the mean time to be suspended. The court of appeals held it could not, and the judge who gave the only opinion in that court says, "There are but two cases in which the proceedings upon the trial at the circuit can be reviewed, at the general term, in the first instance, *before judgment*." This case, as I understand it, has no bearing on the one now before us.

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Gilbert v. Beach, (16 *N. York Rep.* 606,) was decided by the court of appeals at the same term with that of *Cobb v. Cornish*, and upon the same grounds. *Watson v. Scriven* (7 *How. Pr. Rep.* 9) was tried before a referee, who reported in favor of the plaintiff. The defendant made a case and moved, at a special term, to stay the plaintiff's proceedings on the report until a motion could be made to set it aside. That motion was denied, and the justice before whom it was heard remarked, in his opinion, that when, in case of trial by jury, there has been a general verdict, the motion for a new trial must be made at the circuit or a special term, and the decision on such a motion may be reviewed on appeal, under section 349 of the code. And he further said, that besides the appeal, before judgment, from such a decision under section 349, an appeal upon questions of law may be taken after judgment, under section 348; and I do not understand the last expression of opinion to be limited to those questions of law only which had been raised and decided on a motion for a new trial at circuit or special term, but to extend to all questions of law decided and the decision of which had been properly excepted to, either at the trial or on a motion for a new trial.

In *Taylor v. Harlow*, (11 *How.* 285,) a verdict was taken at circuit for the plaintiff, subject to the opinion of the court upon a case ordered to be heard in the first instance at a general term, where the case was heard and judgment rendered for the plaintiff. To the decision of the general term the defendant excepted, and afterwards moved at special term, on a case, for a new trial; when the court held that the practice had been irregular and the case was improperly ordered to be first heard at general term; but that it was not proper for a judge at a special term to interfere with that decision and overrule or set aside the judgment rendered by the general term.

The counsel for the defendant has referred to the case of *Wright v. Delafield*, (11 *Howard*, 465,) as authority for his

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position that an appeal lies from a judgment entered on a verdict without first moving at special term to set aside the verdict or for a new trial; and to numerous other cases as showing that such appeals have been heard and decided without objection; and he has likewise referred to other sections of the code, supposed to be in accordance with and to sustain his position. Without particular reference to those citations, I am of opinion that under the sections of the code above referred to this appeal is well taken, and the motion to dismiss it should be denied, with \$10 costs.

Motion denied.

[NEW YORK GENERAL TERM, November 7, 1860. *Sutherland, Bonney and Hogeboom, Justices.*]

BRETT and others vs. BUCKNAM and others.

Under the provisions of the code, a party to an action may not only be examined, at the option of the adverse party, in the same manner as any other witness, but he may also be required and compelled to produce, on such examination, books, papers, &c. which are under his control.

The proper mode of proceeding, under an order for the examination of a party, where a production of books &c. is sought, is to continue the examination of the witness until it shall be ascertained whether or not he has under his control any, and if any, what books or papers, admissible as evidence in the action or necessary for the purposes of the examination; and then for the judge to direct what books or papers (if any) shall be produced, and when and where they shall be produced.

A party calling his adversary as a witness has no right to examine any books or papers, or parts of books or papers, which are neither pertinent to the issues in the action, nor connected with, or relevant to, the matters in controversy.

A PPEAL from an order made at a special term, for the examination of a plaintiff as a witness, before the trial.

By the Court, BONNEY, J. The revised statutes (2 R. S. 199, § 21 &c.) authorize this court to compel the discovery

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of books, papers and documents in certain cases; and the rules of this court (14-17) apply specially to a discovery under such statutes. The code (§ 388) makes provision for obtaining an admission, inspection or copy of books, papers or documents material to an action, or containing evidence relating to the merits thereof or the defense therein. Section 389 prohibits any action for discovery and any examination of a party on behalf of his adversary, except in the manner prescribed by chapter six. And sections 390 to 397 provide for examinations, which are the substitute for all other modes of discovery.

Under section 390, a party may be examined by his adversary, *in the same manner as any other witness*, either at the trial, or conditionally, or upon commission; and under section 391 the examination provided for in section 390, (*that is, the examination of a party in the same manner as any other witness may be examined,*) may be had at any time before trial, at the option of the party claiming it, on a previous notice of not less than five days. It cannot be doubted that *any other witness* may be required and compelled, on examination, at or before a trial, to produce his books &c. containing matter in writing pertinent to the issues and competent to be given in evidence in the action; or necessary to enable the witness by reference thereto to testify in the cause. And, in my opinion, it is clear, that, under these provisions of the code, a party to an action may not only be examined at the option of the adverse party, in the manner provided, but may also be required and compelled to produce, on such examination, books, papers, &c. which are under his control; and such I understand to be the effect of the decisions on this point.

Perhaps the orders made in this case were more comprehensive, in terms, than they should have been; but whether so or not, the proper mode of proceeding under them, and in other like cases, in my opinion, will be to proceed with the examination of the party called as a witness, until it shall be

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ascertained whether or not he has under his control, any, and if any what, books or papers admissible as evidence in the action, or necessary for the purposes of the examination; and then for the judge before whom the examination is had, to direct what books or papers (if any) shall be produced, and when and where they shall be produced. The party calling his adversary as a witness, will have no right to examine any books or papers, or parts of books or papers, which are neither pertinent to the issues in the action, nor connected with, nor relevant to, the matters in controversy.

The order appealed from should be affirmed, without costs to either party; and the examination of the plaintiff should proceed in the manner above indicated.

[NEW YORK GENERAL TERM, November 5, 1860. *Sutherland, Ingraham and Bonney, Justices.*]

CLARK vs. THE EIGHTH AVENUE RAIL ROAD COMPANY.

A rail road company is bound to exercise great care and caution in carrying passengers through the streets of a city.

In an action by a passenger, to recover damages for an injury sustained by him by means of a collision, the negligence of the plaintiff, in order to defeat the action, must have contributed to the injury or the accident.

A passenger's occupancy of the platform of the car, if it be by the permission of the carriers or their servants, and if accompanied by active efforts on the part of the passenger to get in a safe position, and to avoid being hurt after he sees danger approaching, will not render him guilty of negligence.

The statutory provision that a person injured while standing on the platform of a car cannot sustain an action for the injury, provided a notice is posted *inside* of the car, forbidding passengers to take such a position, and there is room inside of the car, will not prevent a recovery by a passenger injured while standing on the platform, where the only notice not to occupy the platform is posted *outside* of the car, and is not shown to have come to his knowledge, and the car is full, inside.

In what cases it is proper to submit the question of the plaintiff's negligence to the jury; and when it is the duty of the judge to direct a nonsuit.

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APPEAL by the defendants from a judgment rendered in favor of the plaintiff for \$450 damages besides costs, in a suit tried before Mr. Justice BALCOM, at a circuit in New York on the 4th day of November, 1858. The action was brought to recover damages for personal injuries sustained by the plaintiff in consequence of a collision between one of the cars of the defendant and the horses attached thereto proceeding up Hudson street, and at its junction with Canal street, and a horse and cart in Canal street. The plaintiff was standing on the steps of the forward platform of the car, and in that position was struck by the shaft or hub of the wheel of the cart and thrown from the car and injured in his ankle and leg. One of the principal questions in the case was, whether any negligence was shown to have been committed on the part of the defendant. The plaintiff's evidence tended to show that the plaintiff, having paid his fare, was standing on the steps of the platform, without objection on the part of the driver or any other agent or employee of the defendants; the inside of the car and the forward platform appearing to be full. The horses were on a trot, and the horse and cart, when discovered, were some three or four rods ahead, not moving, but the horse appearing frightened and ungovernable, in a position to be seen by the driver of the car, who might have slackened the pace of his horses but did not; the brakes not being applied till after the accident. The horse attached to the cart at length started, having been near the track of the rail road, and some portion of the cart was supposed to have come in collision with the person of the plaintiff, which was not exposed outside of the line of the body of the car, and that did not appear to have been touched by the horse or cart. The plaintiff paid his fare to the conductor, on the platform. The defendant moved for a nonsuit, which was denied and its counsel excepted. Some evidence was given on the part of the defence, tending to make the case somewhat more favorable to the defendant, and the motion for a nonsuit was renewed at the close of the

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testimony and again denied, and the defendant excepted. Various exceptions were also taken to the charge of the judge, which are considered in the opinion of the court. The jury rendered a verdict of \$450 in favor of the plaintiff, on which judgment was entered, and the plaintiff appealed.

H. M. Hyde, for the plaintiff.

Richard Mott, for the respondent.

By the Court, HOGEBROOM, J. The judge at the circuit, in his charge to the jury, announced the rules of law applicable to cases of this description correctly, in the main, as is not denied; and as to the points to which exceptions were taken, I think he was also correct. He is supposed to have erred in charging the jury that the defendants and their servants were bound to exercise *great* care and caution in carrying the plaintiff. But this was manifestly the true rule as between the defendants and their passengers; the only question being, whether he might not, consistently with the law, have laid down a more rigorous rule. (*Story on Bailments*, § 601. *Angell on Carriers*, § § 521 to 523. *Holbrook v. Utica and Schenectady R. R. Co.*, 16 Barb. 115. *Hegeman v. Western R. R. Corporation*, Id. 353. *Camden and Amboy R. R. and Transportation Co. v. Burke*, 13 Wend. 611. *Caldwell v. Murphy*, 1 Duer, 233. *Bowen v. N. Y. Central R. R. Co.*, 18 N. Y. Rep. 408. *Ingalls v. Bills*, 9 Metcalf, 1. *Stoke v. Salstonstall*, 13 Peters, 181, 191, 193.) The case of *Brand v. Schenectady and Troy R. R. Co.* (8 Barb. 368) is supposed to have laid down a different rule, and to have required the exercise of only ordinary care; but this is an entire mistake. The latter was the case of a collision between the defendant's car and a foot passenger on a street or highway; and it was held that, with equal means of observation and equal opportunities to avoid the collision, each were bound to the exercise of reasonable and ordinary care, which ordinary care was defined to be such reasonable care as a pru-

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dent person would employ in view of all the circumstances. But the higher and more rigorous care which the carriers of passengers for hire were bound to observe towards their passengers, whom they *contracted* to convey safely, was in that case very distinctly recognized.

That the negligence of the plaintiff—in order to defeat the action—must have contributed to the injury or the accident, or, as the case somewhat obscurely expresses it, to the *cause* of the accident, is also well settled. I regard the expression just noted as intending the same thing as the injury or catastrophe itself, and as not likely to mislead the jury.

Nor do I think there was any error in charging the jury that the plaintiff's occupancy of the platform of the car, if done by the permission of the defendants or their servants, and if accompanied by active efforts, on the part of the plaintiff, to get in as safe a position as he could, and to avoid being hurt, after he saw the horse and cart ahead of the car, did not make him guilty of negligence. There is some reason for saying that such a position is, in some respects, in the case of cars drawn by horses through the streets of a city, not more unsafe than one inside of the car; and when occupied with the permission of the defendants, and without notice or information of its danger—the inside of the car being full—may be, perhaps, properly said not to justify the imputation of negligence to the plaintiff. The charge must be considered in the light of the evidence, and thus considered, I regard it as unobjectionable. The statutory provision, (1 R. S. 1238, § 45, 4th ed.) that a person injured while standing on the platform of a car, cannot sustain an action for the injury, provided a notice is posted *inside* of the car forbidding the passenger to take such a position, and provided also there is room for the passenger inside of the car, cannot avail the defendants; for, according to the plaintiff's case, neither of these provisos were observed by the defendants. In the first place, the notice not to occupy the platform was posted *outside* of the car, and is not shown to have come to the knowl-

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edge of the plaintiff; and in the second place, the car, according to the plaintiff's testimony, was full.

Nor was the defendants' exception tenable, to the remark of the judge, that it had been decided that where a party was injured by the negligence of the agents of a rail road company, when seated in a baggage car, if he was there by permission of the company, such party could recover. It may be said to have been rather the statement of a fact than the announcement of a rule of law. The fact that such decision had been made was not controverted, and it was used merely for purposes of illustration, and did not assume the form or character of a direct charge upon that point.

These embrace, substantially, the exceptions made to the rulings of the judge, except those made to his refusal to nonsuit, and one made to his refusal to charge that there was no evidence to show such fault, negligence or mismanagement on the part of the defendants' agents, as to make the defendants liable in this action. These present, as I think, the only serious and embarrassing questions in the case. I have had some doubt whether the evidence of the defendants' negligence was sufficiently strong to authorize its submission to a jury, but have concluded, on the whole, that it was not error to leave that question to them. It can scarcely be said to have been entirely clear that no negligence was committed by the driver of the car. A restive and refractory horse, attached to a cart, is found three or four rods in front of the defendants' car. Some of the evidence shows the horse to have been partly on the track. If the cars proceeded on their course, there may perhaps be said to have been a reasonable probability that the car, or the horses attached to it, would come in collision with the fractious animal in front, or so frighten and excite him as to expose the passengers in the car or on the platform to danger of injury from the horse or the cart. If the jury could legitimately have drawn such an inference, their verdict for the plaintiff would stand, and a refusal to nonsuit would be proper. We can scarcely say that the case

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was so clear for the defendants as to make it illegal for the judge to submit to them the question of fact, a question which involved the necessity, on their part, of determining not only what in reality were the facts bearing on this question of negligence, but what were the legitimate inferences to be drawn from them in view of all the circumstances of the case. This case lies very near the line which divides those cases where it is the duty of the judge to nonsuit the plaintiff, from those where he is authorized to submit the question to the jury.

On the whole I think the verdict should not be disturbed, and that the judgment at the circuit should be affirmed.

Judgment affirmed.

[NEW YORK GENERAL TERM, November 7, 1860. *Sutherland, Bonney and Hogeboom, Justices.*]

ALLEN and others vs. MCCRASSON

Where, upon a motion to vacate an order of arrest, the affidavit of the plaintiff is read, which positively and unequivocally alleges the making of certain false representations by the defendant, at the time of purchasing goods of the plaintiff; and this is met by the affidavit of the defendant, wherein he positively denies making such false representations, the defendant's affidavit should be considered as neutralizing that of the plaintiff upon that point; leaving the plaintiff to make out his case of fraudulent representations by other or further proofs or circumstances.

The question, upon motions to vacate orders of arrest, is whether upon the whole case as made by the affidavits on both sides, the court would, if called upon to act on the application as *res nova*, grant the order of arrest.

A PPEAL from an order made at a special term, denying the defendant's motion to vacate an order of arrest.

John C. Dimmick for the appellant.

J. B. Marvin for the respondents.

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By the Court, SUTHERLAND, J. I cannot approve the principle announced by the learned justice at special term as the principle upon which he denied the motion to vacate the order of arrest in this case. The affidavit of one of the plaintiffs positively and unequivocally alleged the making of certain false representations at the time the goods were bought. The affidavit of the defendant as positively and unequivocally denied making such false representations. The principle announced by the learned justice, and upon which he appears to have denied the motion, was, that in such case the affidavit of the defendant was not sufficient to vacate the order of arrest; that it required something more than the defendant's affidavit to vacate the order of arrest—something to turn the scale.

Fraud is a crime. Imprisonment for debt is abolished. When a man is arrested for fraudulently contracting a debt, he is arrested for the fraud, and not for the debt. The provisional remedy of arrest is given for the collection of the debt; but the provisional remedy is to punish the debtor for his fraud by imprisonment, until he pays the debt. If this is so, every principle of justice, and all the analogies of the common law, require that in this case on the point, whether the defendant made the fraudulent representations, his affidavit should be considered as neutralizing the plaintiff's affidavit, leaving the plaintiffs to make out their case of alleged fraudulent representations by other or further proofs or circumstances.

I think the true principle which should control the disposition of these motions to vacate orders of arrest is stated in *Chapin v. Seeley*, (13 *Howard*, 490,) and in *Union Bank v. Mott*, (6 *Abbott*, 315,) which is substantially, that the question is upon the whole case as made by the affidavits on both sides; would the court, if called upon to act upon the application as *res nova*, grant the order?

Again, the alleged fraudulent representations for which the defendant was arrested were merely as to what he was worth.

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The allegations are, that when the first bill of goods was bought, the defendant said he was worth \$20,000; when the second bill was bought, that he was worth \$15,000. Assuming that the defendant made those representations, did he make them from a mistaken opinion as to what he was worth; or did he know at the time that he was insolvent; and did he, knowing this, make them with intent to defraud the plaintiffs?

In my opinion, the circumstances alleged in the affidavits upon which the order of arrest was granted, are very slight to show the fraudulent intent; and these circumstances, slight as they are, are satisfactorily explained by the affidavits on which the motion to vacate the order of arrest was made.

The order of the special term should be reversed, with ten dollars costs.

[NEW YORK GENERAL TERM, November 5, 1860. *Sutherland, Hogeboom and Bonney*, Justices.]

WARREN vs. EDDY, impleaded, &c.

An order for affirmance, by default, founded upon a notice of argument addressed to and served upon the attorney of a defendant, after the death of the latter, and after the attorney for the appellant has been notified of his death, is irregular.

If the personal representative of the deceased defendant is a non-resident, so that the action cannot be revived in his name, the proper course of the plaintiff, if he desires to prosecute the appeal, after receiving notice of the death of the defendant, and that his administrator intends to abandon the appeal, is, to have an administrator appointed here, and then apply to have the action revived in the name of the latter.

Whether the general term, where a case has been made, on appeal, will get possession of the appeal, so as to be able to affirm the judgment, before the case has been filed or served? *Quere.*

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APPEAL from an order made at a special term, setting aside a judgment of affirmance.

Mr. Garvin, for the defendant and respondent.

E. P. Clark, for the plaintiff and appellant.

By the Court, SUTHERLAND, J. I think the order of the general term affirming the judgment, and the judgment of affirmance entered thereon, were made and entered irregularly, and that the order of the special term appealed from, setting aside the judgment of affirmance, should be affirmed.

The notice of argument for the February general term, 1860, was addressed to and served upon J. W. Culver, as the attorney for the defendant Daniel F. Eddy, long after the death of the latter, and after the attorney for the appellant had been notified of his death.

At the time of the service of the notice, J. W. Culver could not act for a dead man, and he had no authority to act for or represent his estate.

The order of the general term for affirmance by default, founded on such notice, was therefore irregular, inasmuch as it was made without notice to any one representing the estate or interests of Daniel F. Eddy's estate. His personal representative was a non-resident, and the action could not therefore have been revived in his name; but the plaintiff, if he desired to prosecute the appeal, after he received notice of the death of Eddy, and that his foreign administrator intended to abandon the appeal, could have had an administrator appointed here, and then he could have applied to have the action revived in the name of such domestic administrator. I see no other way in which he could regularly obtain a judgment of affirmance, after the death of Eddy.

There is doubt, too, as the case was never served or filed, whether the general term ever got possession of the appeal, so as to *affirm* the judgment. The general term could of

Warren v. Eddy.

course dismiss the appeal for the non-service of the case, but whether they can affirm the judgment, *where a case has been made*, before the case has been either filed or served, is, to say the least, doubtful. (*See Hunt v. Bloomer*, 3 Kern. 341; *Pope v. Dinsmore*, 29 Barb. 367.) But it is not necessary to decide that question in this case. I think the order of the special term should be affirmed, with \$10 costs on the first point alone.

[NEW YORK GENERAL TERM, November 5, 1860. *Sutherland, Hogeboom and Bonney*, Justices.]

INDEX

A

ACTION.

1. Where a complaint alleged that the defendants, officers of a corporation, wrongfully and fraudulently issued false certificates of stock, beyond the chartered power or right of the corporation; that subsequently a parcel of such false certificates, purporting to represent 8000 shares of genuine stock, came into the hands of the plaintiff, by purchase, not from the defendants, but from third parties, who had taken them, either directly or remotely, from the defendants; *Held*, on demurrer, that the complaint showed no cause of action on the part of the plaintiff, against the defendants; there being no privity between the parties, and the plaintiff having his remedy against the parties from whom he purchased the false certificates. *Seizer v. Mals*, 76
2. Where a party is in possession of property, claiming it as his own, and proves a sale thereof to him by the former owner, sufficient as between them, to pass the title, this is sufficient proof of property to entitle him to recover against a wrongdoer, for taking and converting it. *Beatty v. Swarthout*, 684
3. Before an action will lie, at the suit of an individual sustaining peculiar damages, against a municipal corporation, for an omission to perform a duty enjoined by law, it must be shown that the duty has been imposed *absolutely* and *imperatively*,

and does not rest in *discretion*. *Peck v. Village of Batavia*, 684

See ARREST, 8.
JUDGMENT, 1.
JUSTICES' COURTS, 1.

ADJOINING TOWNS.

See JUSTICES' COURTS, 2.

AFFIDAVIT.

See ARREST, 8, 9.
PRACTICE, 8 to 8.

AGENT AND AGENCY.

See PRINCIPAL AND AGENT.

AGREEMENT.

1. *General rules of construction.*
 1. The general rule or principle is, that the construction, force and effect of a contract, and the rights of the parties under it, as distinguished from their remedies on it, are to be determined by the law of the place of the contract, unless the parties contemplated another place for performance; and if they did, then the law of the place so contemplated is to prevail. *Lee v. Selleck*, 522
2. *Construction of, in particular cases.*
 2. Upon a sale of goods by the plaintiff to B. S., in the city of New York,

it was agreed between the parties that B. S. should give his promissory note for the price, to be indorsed by G. S. a resident of M. in the state of Illinois. A note, payable to the order of G. S. at M. was accordingly made and signed by B. S. and by him forwarded to G. S. in Illinois. G. S. on receiving the note, indorsed it, and sent the same by mail to B. S. at Beloit, Wisconsin, who enclosed the note thus indorsed, to the plaintiffs at New York. *Held* that the note, and the indorsement, were independent contracts; the former to be performed in Illinois, and the latter in New York. That both the note and the indorsement were to be deemed made in New York; and that the question of the liability of G. S., as indorser, was to be determined by the law of New York, and not by the law of Illinois. Accordingly *held* that a recovery could be had, in this state, against the indorser, without proving any attempt to collect the note of the maker by a suit against him. *Lee v. Selleck*, 522

See also *Boutwell v. O'Keefe*, 434.

Clark v. Gilbert, 576.

Woodford v. Patterson, 636.
PARTNERSHIP, 8.

8. Validity of.

3. A contract void by the statute of frauds, is capable of becoming valid and obligatory by subsequent part performance. *Boutwell v. O'Keefe*, 434
4. Where there are subsequent transactions between the parties to a void contract, which are not only in apparent conformity to the terms of such contract, but in actual execution of it—done *under* the contract—the contract originally void becomes valid and obligatory upon the parties, and they cannot successfully resist its enforcement, 52
5. An agreement between M. and B., to the effect that M., in consideration of the giving of a promissory note by B. for \$3000, would use his supposed influence with the street commissioner of the city of New York, and by such influence induce a favorable settlement and allowance of certain disputed claims and accounts of B. against the city corporation, the allowance of which

could not be obtained without such influence; *Held* illegal, and that no contract made in consideration thereof could be enforced by law. *Devlin v. Brady*, 518

6. And where a promissory note, given as the consideration of such an agreement, to M. was indorsed by the latter to the plaintiff, with notice of the facts, who procured the same to be discounted by a bank for his own benefit, and he himself received the proceeds of the discount, and the plaintiff, after the note was dishonored and in the hands of the bank, took it up and paid to the bank the amount thereof; *Held* that he was not entitled to stand in the shoes of the bank, which received it before maturity, and paid value for it, in good faith; but that his position and rights, as against the prior parties thereto, were the same as if he had never parted with the note. 53

4. Rescission of.

See VENDOR AND PURCHASER,
WORK AND LABOR.

ALIEN.

1. Although an alien may not acquire title to real estate, as against the true owner, by an adverse possession of twenty years, claiming title thereto in himself, yet the statute of limitations will furnish a perfect defense to an action of ejectment against him by the true owner. *Overing v. Russell*, 268

AMENDMENT.

1. Of answer.

1. A motion to amend an answer, so as to authorize certain evidence to be given, if within the jurisdiction of a referee to grant, is addressed to his discretion, and from his decision no appeal will lie. *Woodruff v. Hurson*, 557
2. Where the amendment proposed to be made, in an answer, contemplates a new defense, *pro tanto*, a referee has no jurisdiction over the motion,

and the amendment, if granted, would be irregular, *ib*

2. *Of judgment.*

3. An amendment of the record of a judgment, and the execution, made by order of the court, upon an *ex parte* application, after a sale of property by the sheriff, by substituting the true name of the defendant for the name erroneously inserted, will not have the effect to render the sale valid, or to divest the defendant of the title to the property levied on, and transfer it to the purchaser. *Farnham v. Hildreth*, 277

See APPEAL.
JUDGMENT.

ANSWER.

See AMENDMENT, 1.
JUSTICES' COURTS, 1.

APPEAL.

1. A motion to amend an answer, so as to authorize certain evidence to be given, if within the jurisdiction of a referee to grant, is addressed to his discretion, and from his decision no appeal will lie. *Woodruff v. Hurson*, 557
2. A judgment is to be deemed entered by the direction of a single judge when it is entered by the clerk, at the circuit, upon the verdict of a jury, under section 284 of the code, and from such a judgment section 348 authorizes an appeal upon the law to the general term, without any motion having been previously made, at a special term, for a new trial. *Morrison v. The New York and New Haven Rail Road Co.*, 568.
3. Such an appeal brings up the *law* of the case, as presented by exceptions taken on the trial. *ib*
4. To present a question of *fact* upon the evidence, or the right of the unsuccessful party to a new trial, for the reason that the verdict is against evidence, or upon the ground of surprise, or newly discovered evidence,

or the like, a motion must be made at a special term, and from the order made thereon, an appeal to the general term lies. *ib*

5. When a question of law, only, is raised at the circuit, which is decided by the justice there presiding and disposes of the whole case, and the justice directs the finding of a verdict, and judgment is entered thereon, an appeal from such judgment, to the general term, may be immediately taken. *Morange v. Morris*, 650
6. Such a judgment is to be deemed entered upon the direction of a single judge, within the meaning of section 348 of the code. *ib*
7. Whether the general term, where a *case* has been made, on appeal, will get possession of the appeal, so as to be able to *affirm* the judgment, before the case has been filed or served? *Quars. Warren v. Eddy*, 664

APPROPRIATION OF PAYMENTS.

See PAYMENTS, 2 to 12.

ARREST.

1. Where the defendant obtained \$2300 from the plaintiffs, upon three checks drawn by him, two of which were upon a bank at Rahway, N. J., and the other upon a bank in the city of New York, representing, at the time, that the two former checks were good, and that he was authorized to draw for \$40,000; that he had the money in bank, and that he was good for the amount of those checks, himself; and it appeared, upon a motion to discharge an order of arrest, that two days before the defendant obtained the money on the checks, his notes, to the amount of \$6000, were protested, and that attachments were soon after issued thereon, and the notes still remained unpaid; that he was insolvent at the time, and knew it; that he had no funds in the bank at R.; and had only been *allowed* to overdraw his account, and the bank declined to honor the checks; that he made other cotemporaneous attempts to

- obtain goods on credit, from other persons, upon like representations; and that he failed, two days after obtaining the money on the checks; the defendant not positively alleging, on the motion, that he believed himself to be solvent when he obtained the money; *Held* that a *prima facie* case of fraudulent intent was established, in respect to all the checks; and the order refusing to discharge the order of arrest was affirmed. *Ballard v. Fuller*, 68
2. On a motion to vacate an order of arrest, evidence of other concurrent frauds, committed by the defendant, is admissible, as proof of his intent in committing the particular fraud charged. 68
3. An action—the leading object of which is to recover damages for the injuries and losses the plaintiff has sustained by the fraud of the defendant, which fraud consists in the defendant's falsely and fraudulently pretending to have been the owner of land in Iowa, which he induced the plaintiff to take in exchange for a lot of land in C. in this state, worth \$2000, whereby he lost that amount of money; and also the further sum of \$300 expenses incurred in removing himself and family to Iowa on a fruitless journey to take possession of that land, and in returning to C.; and the further sum of \$500 for losses, sufferings and hardships consequent upon such journey, and for sacrificing a remunerative employment at home—is not an action upon *contract*, but is a special action on the case, to recover damages for a fraud. *McGovern v. Payn*, 88
4. Such a case is not within the 4th subdivision of section 179 of the code, inasmuch as it cannot be said to be a suit to enforce a liability for a *debt* fraudulently contracted, or an *obligation* fraudulently incurred. Consequently the defendant cannot be arrested and held to bail, in an action of that nature. 68
5. That section of the code obviously contemplates that the debt or obligation shall be of that character that a suit might be brought on it, even if unaccompanied by fraud in contracting or incurring it, although in the latter case an order of arrest could not be obtained. In other words, that fraud is not the gist of the cause of action, though it is of the order of arrest. *Per Hoosboom, J.* 68
6. Where an order of arrest covers causes of action for which the defendant is not liable to arrest, it should be vacated and set aside. 68
7. Counts in a complaint, of a character not such as to justify an order of arrest, will, if coupled with a count under which an order can properly be obtained, necessarily vitiate an order of arrest granted upon the whole complaint. 68
8. Where, upon a motion to vacate an order of arrest, the affidavit of the plaintiff is read, which positively and unequivocally alleges the making of certain false representations by the defendant, at the time of purchasing goods of the plaintiff; and this is met by the affidavit of the defendant, wherein he positively denies making such false representations, the defendant's affidavit should be considered as neutralizing that of the plaintiff upon that point; leaving the plaintiff to make out his case of fraudulent representations by other or further proofs or circumstances. *Allen v. McCrasson*, 662
9. The question, upon motions to vacate orders of arrest, is whether upon the whole case as made by the affidavits on both sides, the court would, if called upon to act on the application as *res nova*, grant the order of arrest. 68

ASSESSMENTS.

For taxes, see CONSTITUTIONAL LAW, 2, 3, 4.

For streets, see NEW YORK, (CITY OF,) 1 to 4.

ASSIGNMENT.

By a debtor for the benefit of his creditors.

See DEBTOR AND CREDITOR.

ASSIGNOR AND ASSIGNEE.

As a general and well established rule, the assignee of a demand is not protected against the subsequent dealings of his assignor, with the debtor, where the latter acts in good faith. *Huntington v. Potter*, 800

See LEASE.

PARTNERSHIP, 6.

RENT.

VENDOR AND PURCHASER, 6.

ATTORNEY.

See WITNESS.

ATTORNEY GENERAL.

The attorney general may bring an action in the name of the people, to restrain a municipal corporation from exercising authority, in making a contract, or performing similar acts, not possessed by it under its charter or by law. *People v. Mayor &c. of New York*, 85

B

BANKS.

1. The cashier of a bank, as its executive officer, has authority to take such measures for the security and eventual collection of a debt as he deems proper, and to act, in reference to the collection or compromise of the same, according to the general usage, practice and course of business. *Bridenbecker v. Lowell*, 9
2. In the absence of evidence that the cashier of a bank was restricted in his authority, it will be assumed that a transmission of promissory notes held by the bank, to an indorser, to enable the latter to obtain an indemnity from the maker, was within the scope of his authority. 4b
3. The agents of a bank, occupying a confidential relation towards it, cannot act, as such, in matters in which they have a personal interest. 4b

See PRINCIPAL AND AGENT.

PROMISSORY NOTES, 3, 4, 5.

BILLS OF EXCHANGE.

The supreme court has no power, in an action upon a draft or bill of exchange, to order the draft to be annexed to a commission issued to take the examination of witnesses for the defendant, residing in another state. *Butler v. Lee*, 75

BILL OF LADING.

1. A bill of lading need not be signed by the master of the vessel. It is sufficient if it be signed by the consignee of the goods, who is also owner of the vessel. *Dow v. Greene*, 490
2. What will amount to proof of an implied authority in a clerk in a mercantile house to sign shipping bills in the names of his principals. 4b

See CONSIGNOR AND CONSIGNEE.

BONA FIDE PURCHASER OR HOLDER.

See JUDGMENT, 6.

PROMISSORY NOTES, 2.

BROOKLYN, CITY OF.

See MUNICIPAL CORPORATIONS.
SEWERS.

BROOKLYN CITY RAIL ROAD COMPANY.

1. The resolution of the common council of the city of Brooklyn, of the 19th of December, 1858, by which it signified its assent to the construction of the rail road over the routes designated in the articles of association of the Brooklyn City Rail Road Company, upon the condition annexed thereto, was authorized by the 5th subdivision of the 28th section of the general rail road act, and therefore lawful; and the acceptance thereof, with the conditions annexed, by the rail road company, constituted a contract, which the company was bound to perform, and which the common

council could not rescind, without adequate cause. *SCRUGHAM, J. dissented. Brooklyn Central Rail Road Co. v. Brooklyn City Rail Road Co.,* 858

2. The grant to the Brooklyn City Rail Road Company, and its acceptance upon the condition annexed, with the duties and obligations and large expenditures resulting therefrom, invested the company with the right of property in the franchise, of which it could not be deprived without its consent, or against its will, *ib*

BROOKLYN AND JAMAICA RAIL ROAD COMPANY.

The Brooklyn and Jamaica Rail Road Company was incorporated by an act of the legislature, passed April 26th, 1832, with the right to construct a rail road, commencing at an eligible point within the village of Brooklyn, and extending to any point within the village of Jamaica, with lateral railways to the villages of Flatbush and Flushing. The grant was not to commence at several points, but at one point in Brooklyn. It was not to ramify itself through the several streets of the city, at any and at all times thereafter, but to run from the one point direct to another point in the village of Jamaica. The company accordingly located its western terminus at the foot of Atlantic street, Brooklyn, and its eastern in the village of Jamaica, where they had ever since remained. *Held*, that the company, having made its location, and adhered to it for many years, was concluded by what it had done; and that it had no franchise in Furman street, which it could assign to another company. *SCRUGHAM, J. dissented. Brooklyn Central Rail Road Co. v. Brooklyn City Rail Road Co.,* 858

BURIAL, (*right of.*)

1. The right of burial, when confined to a church-yard, as distinguished from a separate independent cemetery, although conveyed with the common formula of "heirs and assigns forever," must, it seems, stand

upon the same footing as the right of public worship in a particular pew of the church. *Richards v. The Northwest Protestant Dutch Church,* 42

2. It is an *easement* in, and not a title to the freehold; and must be understood as granted and taken, subject (with compensation, of course,) to such changes as the altered circumstances of the congregation or the neighborhood, may render necessary. *ib*
3. Although a deed purports to convey a certain specific piece of ground, and stipulates that it shall "never be dug up, disturbed or destroyed," yet if it describes the premises as belonging to a church corporation, as adjacent to a church edifice, as in a church-yard, and to be used exclusively as a place of interment, and subject to church assessments for regulation and repair, both parties will be held to have considered it as the grant of a mere easement, and not of an ordinary absolute estate in fee. *ib*
4. Like the sale of a church pew, which gives the mere right to worship in the particular place while the church stands and is occupied for religious purposes, the sale of a church vault gives, it seems, the mere right of interment in the particular plat of ground, so long as that and the contiguous ground continues to be occupied as a church-yard. *ib*
5. In cases of disturbance the owner may be, and no doubt is, entitled to compensation, but he cannot have an injunction to prevent the disposition of the soil, and the removal of the remains therein deposited, should the court, on application by the officers of the church, deem such disposition proper, and order it accordingly. *ib*

C

CASES DISAPPROVED, OVER- RULED, RE-AFFIRMED.

1. The case of *Cole v. The Trustees of the Village of Medina*, (27 Barb. 218,) re-affirmed. *Peck v. Village of Batavia,* 634

2. The case of *Crandall v. Bryan*, (15 How. Pr. Rep. 48,) disapproved. *McGovern v. Fawn*, 83
3. *Morse v. Keys*, (6 How. Pr. Rep. 18,) deciding that a wagon is not exempt from levy and sale under execution, overruled. *Dains v. Prosser*, 290

CARRIERS.

Of passengers.

1. The extent and the measure of the duties and the responsibilities of a carrier of passengers and the passenger are quite different. The carrier is bound to the exercise of all possible skill, foresight and care. The passenger is bound to conduct himself with due and ordinary prudence, such as a careful man would use under the circumstances. He is not required to foresee unexpected dangers, nor to speculate upon risks, but he is obliged not to expose himself to danger which is known or may be looked for, in a manner inconsistent with ordinary caution. *Per EMOTT, J. Willis v. Long Isl. and Rail Road Co.*, 898
2. It is not conclusive evidence that a person is negligent of his safety in assuming a particular position, that had he not been in that place or in that position, he would not have been injured. *Per EMOTT, J.* 2b
3. It is not negligence in a passenger to occupy a position which will involve increased risk to him of the consequences of negligence and misconduct of the carrier. 2b
4. A passenger neglects his duty when he does not guard against the risks which he knows to be ordinarily incident to the mode of travel which he employs; but he cannot be charged with such a neglect for omitting to provide against the possible consequences of the misconduct of the carrier. 2b

See RAIL ROAD COMPANIES, 8 to 22.

CERTIORARI.

1. In general, if not universally, the supervisory power of the supreme

court over inferior tribunals, by means of the common law writ of certiorari, only extends to questions touching the *jurisdiction* of the subordinate tribunal, and the regularity of its proceedings. If such tribunal neither exceeds its powers, nor departs from the forms prescribed to it by law, its decisions upon the merits are final and conclusive. *People, ex rel. Van Rensselaer, v. Van Alstyne*, 181

2. The question of jurisdiction is open to review, on a writ of that nature; and so are the *facts* bearing upon the question of jurisdiction. 2b
3. The inferior tribunal may, and must, pass upon the facts touching its jurisdiction; but its decision is not conclusive. If the facts are the subject of dispute, they are to be submitted to the revisory judgment of the supreme court. 2b
4. Hence, the evidence touching those facts must be returned upon certiorari, to the end that the supreme court may examine the same, and determine whether the inferior tribunal rightfully assumed jurisdiction, and whether it came to a right conclusion upon the facts which gave it the power to act. 2b
5. If a road, proposed to be laid out, and actually ordered by the commissioners of highways to be laid out as a public highway, can never become such, in consequence of its terminating in a private inclosure or a private way, it is a question which goes to the jurisdiction, and lies at the very foundation of the authority of the commissioners to act. 2b
6. All evidence, therefore, tending to show the character of the latter way—whether it be private or public; whether it was applied for and was laid out as a private way; whether it has been used as such; whether it is closed at one end or not; and generally how and in what manner it has been laid out and used, must be regarded as legitimate evidence before the referees, upon a jurisdictional question, and properly reviewable on certiorari, directed to the referees. 2b

7. On such a writ, evidence tending simply to show the benefit or utility of the proposed road; to what extent it is likely to be used by, and to serve the public; and how large a public is to be thus benefited, involves an inquiry simply as to the merits of the application, and the propriety of the road, and relates to questions as to which the decision of the referees is conclusive. *ib*
8. The court, therefore, will not compel the return of evidence of that character. *ib*
9. Decisions of the referees, as to the admission or rejection of evidence bearing only on those questions, are not reviewable upon certiorari. They are questions upon which the decisions of the referees are conclusive. *ib*
10. The referees may be required to return whether the applicant, and other owners of land on the proposed route, procured the certificate of the freeholders by offering to give the land, upon such proposed route, in case the road was laid out; or whether such offer was made prior to the making of the certificate of the freeholders, and was withdrawn afterwards. *ib*
2. A complaint stated that the plaintiff was sheriff, &c.; that on, &c., he received a warrant of attachment, duly issued out of the supreme court, and to him directed, in an action against S., whereby he was directed to attach and keep all the property of S. in his county; that the defendant then had in his possession \$300 belonging to S.; that on, &c., the plaintiff made due service of said warrant on the defendant, by delivering to, and leaving with him a copy, with a notice showing the property levied on; whereupon the plaintiff became entitled to receive from the defendant, and he became answerable to the plaintiff for said \$300, which he refused to pay over to the plaintiff, or to account to him for, to his damage \$400. *Held*, on demurrer, that the statement, as to the official character of the plaintiff, was sufficient to show his capacity to maintain the action. *Kelly v. Breusing*, 601
8. *Held*, also, that the complaint was sufficient in form, and that the plaintiff was entitled to judgment on the demurrer. *ib*

See ACTION, 1.
ARREST, 7.

COMPLAINT.

1. In an action brought by the receiver of an insolvent and dissolved corporation, upon a promissory note given to the corporation, the plaintiff, in the first count of the complaint, alleged that the note was executed and delivered to the company, by the defendant, as and for a part of its capital stock. The second count was upon the same note, alleging it to have been given for the premium upon a policy of insurance, and as an agreement to contribute ratably to the losses and expenses of the company. *Held*, that the complaint was not unnecessarily repetitious in its statements, and did not violate any provision of the code. Order made at special term, requiring the plaintiff to elect upon and for which of the two causes of action he would proceed, reversed. *Birdseye v. Smith*, 217

CONSIGNOR AND CONSIGNEE

1. Where consignees make advances upon a bill of lading, to the holder, in good faith, relying upon the same as evidence of the holder's ownership, and without notice of any facts justifying the conclusion that he was not the real owner, or that any fraud was meditated, or had been committed in the purchase of the property, they will be deemed *bona fide* purchasers, and entitled to hold the property, to the extent of their advances, as against the consignors or subsequent purchasers from the latter. *Dows v. Greene*, 490
2. Under such circumstances, the consignors will, as in other cases of a bona fide change of ownership, lose their right of stoppage *in transitu*, notwithstanding the purchase of the property from them may have been fraudulent. *ib*

3. And the right of the consignees being protected by the 1st and 2d sections of the factor's act, (8 R. S. 76, 5th ed.) they may, after demand and refusal to deliver the property to them, maintain replevin against the person in possession, to recover the property, or its value. 43

CONSTITUTIONAL LAW.

1. The act of the legislature, of April 16, 1852, allowing the board of supervisors of the city and county of New York to raise by tax and pay such additional annual compensation to the justices of the supreme court, resident in the first judicial district, as they might deem proper, so far as it authorized, or was intended to authorize, the raising and payment of such additional compensation to the justices of that district, elected prior to the passage of the act and in office when it was passed, and during the terms for which they had been severally elected, was unconstitutional. And the same, and the resolution of the board of supervisors, subsequently passed, giving an additional compensation to the justices of the supreme court in the first district, were without force, and inoperative as to the justices then in office, and did not authorize the payment of any amount to either of them. *People, ex rel. Mitchell, v. Haws*, 207
2. The statutes of this state clearly require that every moneyed or stock corporation shall be assessed for, and pay taxes upon, the whole amount of the balance of its capital stock paid in and remaining, after deducting the shares of stock excepted or exempted by the 10th section of the statute, (1 R. S. p. 994, 5th ed.) notwithstanding a portion or even the whole of such balance may be invested in stocks of the United States held by such corporation. *People ex rel. Bank of the Commonwealth v. Commissioners of Assessments, &c.* 509
3. Those statutes, thus construed, are not unconstitutional in so far as they provide for, or authorize, taxation by state authority of any part of the

capital stock of a moneyed corporation which is invested in stocks of the United States. 43

4. This construction is not an evasion of the admitted rule of law that United States stocks are not liable to taxation by state authority; the assessment being, not in form merely, but in fact and in principle, upon the *capital stock* of the corporation, and not upon the property in which the money paid in for that capital is invested. 43

CONVERSION.

1. To render a demand and to deliver goods equivalent to direct proof of a conversion, it must appear that the party had the *actual possession*, at the time of the demand, and thus had power to comply with it; or that he had, before that time, parted with the goods fraudulently, with a view to evade the demand, or for his own benefit. *Andrews v. Shattuck*, 396
2. If, at the time the demand is made, the goods are in the actual possession of another, and the person of whom the demand is made has not, and never had, any control over them, the fact that he claims the goods, and declares they are his own property, will not amount to a conversion. 43
3. Nor will the fact of his giving an undertaking, to prevent the delivery of the property by the sheriff, to the plaintiff in an action brought to recover the possession, operate as an estoppel *in pais*. 43

CORPORATION.

- A party dealing with a corporation is presumed to know the extent of its corporate powers; that is, he is bound to know the law; but he has a right to presume, in the absence of express notice to the contrary, that the corporation does its duty and acts within and according to, its charter. *Akin v. Blanchard*, 527

See ACTION, 1.
COMPLAINT, 1.



See CONSTITUTIONAL LAW, 2, 3, 4.
PROMISSORY NOTES, 6.

COSTS.

See TRUSTEES, 9.

COUNTER CLAIM.

See PARTNERSHIP, 8.

COVENANT, ACTION OF.

See RENT, 1.

COVENANTS.

Of warranty, &c. See DAMAGES, 1.
To pay rent. See RENT.

D

DAM.

See STREAMS.

DAMAGES.

1. Where the plaintiff purchased of the defendants a piece of land for \$1400, paying \$500 down, and giving her bond and mortgage for \$900; *Held*, in an action for breach of the covenant of warranty and quiet enjoyment contained in the deed, by reason of the existence of a prior mortgage upon the premises, under which the mortgagee was in possession, that the measure of damages was the amount due upon the mortgage last mentioned, with interest from the commencement of the suit. *Winslow v. McCall*, 241
2. Measure of damages, in an action against a telegraph company, for neglecting to deliver a dispatch. *Landsberger v. Magnetic Telegraph Company*, 530
3. The general rule of damages laid down in *Griffin v. Colver*, (16 N. Y. R. 489,) recognized as the settled

rule of law in the state of New York, upon a breach of contract. 53

4. Where the performance of a contract for services has been prevented by the sickness or death of the party hired, or other providential interposition, such party, or his personal representative, can only recover what his services are reasonably worth; and if they have been worthless he can recover nothing. The contract price for the completed service does not measure the compensation for the partial and interrupted service. *Clark v. Gilbert*, 576

See AGREEMENT.

DEATH BY WRONGFUL ACT, &c. 1 to 6

DEATH BY WRONGFUL ACT, &c.

1. In an action under the acts of 1847 and 1849, to recover damages for a death caused by the wrongful act, neglect or default of the defendant, notwithstanding the discretion vested in the jury, by the statute, it is the province of the court to give them definite instructions as to what may or may not be taken into consideration in estimating the pecuniary loss, and if explicit instructions are refused, when asked for, it will be cause for a new trial. *Green v. Hudson River Rail Road Co.* 25
2. In such an action, brought by a husband, as administrator of his deceased wife, to recover damages for her death, loss of service is a proper item of damages; and it is not erroneous for the judge to charge the jury that they may take into consideration the fact that the deceased was an educated and amiable woman. 53
3. The legislature has restricted the damages to a compensation for the pecuniary loss—a loss which may be estimated in money. Hence, damages resulting from the loss of the society of the wife are to be excluded from the consideration of the jury. 53
4. It is not an action sounding in damages, in which the jury exercise a discretion, and may give a *solatium* in respect to the mental suffering of

- the party, or a compensation for the loss of *consortium*, as in an action for criminal conversation. *ib*
5. Where the judge charged the jury that pecuniary damages alone, could be recovered by the husband, suing as administrator, and that loss of service and society was to be taken into the account, as a part of the damages; and the defendant took a single exception to the whole sentence; *Held*, on a case, that the exception was proper; but that if it were otherwise, it being evident that the jury might have been misled by the remark of the judge, a new trial should be granted. *ib*
6. It is erroneous to charge the jury in such an action, that they are not bound to estimate the damages with "precision and nicety." *ib*
7. Where, in an action against a rail road company, to recover damages for causing the death of the plaintiff's intestate, the negligence of the defendant, and the death of the intestate from such negligence, are admitted by the answer, it is erroneous to admit evidence of what the president of the company said, about settling the claim; inasmuch as the only effect of such evidence would be to prejudice the jury against the defendant, by showing an unconscionable defense, or harsh and oppressive treatment of the plaintiff; neither of which could legitimately influence the amount of the recovery. *ib*
8. In an action for damages arising from negligence, the plaintiff must prove the defendant's negligence, and his own freedom from any negligence contributing to the injury. *McGrath v. Hudson River Rail Road Co.*, 144
9. The facts may be so clear and decided that the inference of negligence is irresistible; but where either the facts, or the inference to be drawn from them, are in any degree doubtful, it is the duty of the judge to submit the whole matter to the jury, under proper instructions as to the law. *ib*
10. Where, in an action by an administrator, against a rail road company, for causing the death of the plaintiff's intestate by negligence, the court nonsuited the plaintiff, on account of the negligence of the deceased, contributing to the injury, and refused to submit the question as to such negligence, to the jury; thereby substantially holding that a verdict for the plaintiff would be set aside as unwarranted by the evidence; it was *held* that such decision was erroneous, and a new trial was granted. *GOULD, J. dissented.* *ib*
11. Such a disposition of the case can only be sustained upon the ground that there is no aspect in which the case can be considered which will justify a verdict for the plaintiff. *ib*
12. While it is the established law that a party whose negligence contributed to the injury cannot recover damages therefor, this rule, which does not allow the jury to weigh the comparative negligence of the litigating parties, should not be extended so far as to take from the jury the right to determine (except in a very clear and certain case) whether such negligence has in fact been committed. *Per HOGESBOOM, J.* *ib*
13. Inasmuch as the law does not require, of persons passing on or over a public street or thoroughfare, extreme care or very exact diligence, though a rail road may cross it on the same surface, it does not deprive a party injured of redress, although he was guilty of *slight neglect* which contributed to the injury. *Per PECKHAM, J.* *ib*
14. Where, in an action to recover damages of the defendants for causing the death of another by their negligence, the defendants move for a nonsuit, on the ground that the negligence of the deceased contributed to produce the injury, which motion is granted, to justify the granting of the motion—if it does not appear whether it was granted for the reason specified, or upon the ground that the defendants were not guilty of negligence, or upon both grounds—it must be seen that the evidence in favor of the defendants was so clear, on one or the other of these grounds, that a verdict for the

plaintiff would have been set aside as unwarranted by the evidence. *Ernst v. Hudson River Rail Road Co.*, 159

15. Where a rail road company omits to ring a bell, as required by law, on approaching a street-crossing with a train of cars, it amounts to a neglect of duty—or negligence—on the part of the company; and although such omission will not absolve one who is driving across the track, at the time, from taking proper precautions, yet if in an action against the company for damages occasioned by a collision, the jury should be satisfied, upon reasonable evidence, that the sound of the bell would have attracted the plaintiff's notice, and enabled him to avoid the danger, it *seems* it is a fair question for the jury to determine, whether there was such freedom from negligence, on the part of the defendant, and such want of care, on the part of the plaintiff, as will defeat the action. And their verdict either way will not be disturbed. *Gouzo, J.* dissented. *ib*

16. What circumstances will justify, or require, the submission to the jury, in an action to recover damages for causing the death of another by wrongful act or negligence, of the questions of negligence on the part of the deceased, and negligence on the part of the defendant. *Bernhardt v. Rensselaer and Saratoga Rail Road Co.*, 165

DEBTOR AND CREDITOR.

1. Where an arrangement is made between debtor and creditor, by which the former gives a new security upon property exceeding the amount of the debt secured, in value, and receives back the evidences of his indebtedness; there being at the time a general fund, or security by mortgage upon real estate, embracing all the debts of the debtor, but insufficient to pay the whole; the effect of such an arrangement is to make the specific security the primary fund for the payment of the debt specifically secured by it, and to postpone the right of that debt to participate in the general fund, until the spe-

cific fund has been exhausted. *Bridenbecker v. Lowell*, 9

2. Where a creditor, having several claims against his debtor, receives a portion of the entire amount in a judicial proceeding founded upon them all, as upon the foreclosure of a mortgage given to secure all the debts, the law will apply such money as a payment ratably upon all the claims. The creditor has no right to apply it to the satisfaction of some of the demands—especially to the payment of a debt for the payment of which a specific fund has been provided—to the entire exclusion of others. *ib*

Assignments for benefit of creditors.

3. The fact that an assignee of property in trust for the benefit of creditors has fraudulently appropriated and converted property to his own use, and has misapplied large sums of money, the proceeds of the assigned property, furnishes a better reason for removing the assignee and appointing another trustee in his place, than for breaking up the assignment itself. *Cox v. Platt*, 126
4. A postponement of certain debts, confessedly partnership debts, to others which are really individual debts, but are innocently or mistakenly supposed to be partnership debts, will not avoid an assignment made for the benefit of creditors. *ib*
5. It *seems* that a provision in an assignment, preferring individual debts, known to be such, over partnership debts, out of partnership property, if made without actual fraud, upon a mistaken supposition that the law sanctions such an appropriation of partnership property, will not make the whole assignment void; though it might furnish occasion, in a proper case, for seeking the aid of a court of equity to prevent the misappropriation of the property, and enforce its distribution among the parties properly entitled to participate in it. *ib*
6. If an assignment is only partially objectionable, for making, to some extent, inequitable preferences, it will be only partially broken up, and then only in a way which shall

- enable the court to carry out the principle that equality is equity, *ib*
7. If, in such a case, a complaint is filed to set aside the assignment altogether, and not to carry it into effect, either in whole or in part; to break up the entire transaction, and not for an account and distribution of the assigned property; to satisfy the plaintiff's debt, alone, and not to divide the property equitably among all those having a claim to participate in it, the action cannot be sustained, *ib*
8. The appropriate remedy, under such circumstances, is, it *seems*, a suit in which all the partnership creditors shall be parties; or an action commenced as well for the benefit of the plaintiff as for such others, similarly situated, as choose to come in and make themselves parties thereto; or a suit for an account and distribution of the partnership funds, and avoiding illegal or inequitable preferences, if such there be, *ib*
9. A clause, in an assignment of property in trust for the benefit of creditors, which directs the assignee "to sell and dispose of the property and convert it into money, but not upon credit," does not render the assignment void. *Stern v. Fisher*, 198
10. Where a creditor whose debt is preferred, in an assignment, holds securities for the payment of his debt, it is proper that the assignment should mention that fact; but an omission to refer to it is not inconsistent with entire honesty and good faith, *ib*
11. On the 16th of November, 1854, an agreement was executed by and between B. & F. and certain of their creditors, by which the latter covenanted that in case B. & F. should, on or before the 1st day of December, 1854, execute to S. an assignment of all their property, preferring therein as first class creditors an amount not exceeding \$60,000, and preferring the covenants to the amount of fifty cents on the dollar on their several claims, they would, on the execution and delivery of such assignment, discharge B. & F. from all liability for the balance of their claims. Assignments of the individual and partnership property of B. & F. were executed by them to S. on the 1st of December, 1854. The assignment of the partnership property contained this recital: "Whereas the said parties of the first part are copartners in trade in the city of New York, under the firm of B. & F., and are at present unable to pay their debts, and have agreed to assign the property hereinafter referred to, for the benefit of their creditors, in the manner hereinafter mentioned." By that assignment, certain creditors representing about \$58,000 of the debts were first to be paid in full; the sixty creditors who signed the agreement of November 16, 1854, representing about \$98,000 of the debts, were next to be paid 50 per cent; and then, if there was any thing left, it was to be applied in equal proportions and without preference, towards the payment of all other partnership debts. The assignment of the individual property of the assignors contained similar provisions. Held that the assignments must be construed in connection with the agreement of November 16th, and the three together must be looked upon as constituting one transaction or instrument; and that, thus viewed, the assignments were on their face fraudulent and void as to the plaintiff and other creditors who were not preferred, and who declined signing the agreement: 1st. Because the assignors thereby intended to reserve or secure for themselves a benefit; and 2d. Because the whole proceeding was an attempt to coerce the creditors to enter into the compromise. *Spaulding v. Strang*, 235
12. An assignment of property in trust for the benefit of creditors, which conveys all the real estate of the grantor in a specified town, and all leases and reservations and rents thereof, issuing therefrom, together with all debts due for rents of land in said town, passes to the assignee the covenants, conditions or rights of entry contained in a lease in fee. *Main v. Green*, 448

See MALICIOUS PROSECUTION.
PARTNERSHIP, 1 to 6.
PRINCIPAL AND AGENT, 8.

DEED.

1. Where the premises intended to be conveyed by a deed were not described therein by metes and bounds, nor by monuments, and there was nothing in the deed itself by which the land could be located and its lines ascertained, but the grant was of nine lots in the city of Brooklyn, known and designated, on a map of 151 lots of ground, &c. made by J. L., surveyor, dated 18th September, 1883, and filed in the office of the clerk of the county of Kings as Nos. 140, &c.: *Held* that the map thus referred to became a material and essential part of the conveyance, and was to have the same force and effect as if it had been incorporated into the deed. *Glover v. Shields*, 374
2. And the lots conveyed being, by the map, bounded, on the west, by a public turnpike; it was *further held* that the effect of the deed was to convey the lands up to the turnpike road as that existed and was located at the date of the deed. That the true boundary was to be ascertained, not by inquiring where the east line of the turnpike road was on the 18th of September, 1883, when the map was filed, but on the 17th of July, 1851, when the deed was given. And that if the line of the turnpike had been changed, between those dates, the grantor should, in the deed, have qualified the force of the description on the map, by an intimation of the change, 375
3. D. and his wife, by their deed of conveyance, for a valuable consideration, granted, bargained and sold to the Long Island Rail Road Company, and to their successors and assigns forever, a certain piece of land therein particularly described, comprising an area of sixty square rods, expressing it to be "for the uses and purposes of the road proper." Also, in addition to which 60 square rods, the Long Island Rail Road Company *may* be further entitled to an extra additional width of 70 feet on the south side of the said rail road, for the uses and purposes of a side track, engine house, depot, or such buildings and appendages to said road as may be considered necessary; provided such

buildings may be used for the purposes of said road only, and which additional land contains an area of 64 square rods, more or less;" *habendum* "all and singular the above mentioned and described premises to the Rail Road Company, their successors and assigns forever;" with the usual covenant of warranty. *Held* that the purpose of the grantors, in inserting the words "may be," in the clause relative to the second parcel of land described, appearing, from an examination of the whole instrument, to have been to vest the title to that parcel in the grantee, the words "may be," might be read "shall be;" the court not being bound to adhere to the literal and grammatical sense of the words used. *Long Island Rail Road Co. v. Conklin*, 381

4. And that, inasmuch as by the terms of the deed, the grantees were to take and enjoy the first described lot for the uses of the road proper, and the second described lot for the uses of a side track, engine house and depot, and whatever was granted in the premises of the deed was, by the habendum, to be held in fee, with a covenant of warranty, it was the intention of the grantors to pass the title to both parcels of land described in the deed; and such was its legal effect. 382
5. Where the grammatical sense of the words is not in harmony with the obvious intention of the parties, the courts do not hesitate to substitute one word for another, for the purpose of giving effect to such intention. *Per BROWN, J.* 383
6. Where the execution of a deed is duly proved, and it is read in evidence, on the trial, without objection, it is too late to object, at the close of the case, that the plaintiff has not shown a *delivery*. Execution includes delivery. *Van Rensselaer v. Secor*, 469

See BURIAL, RIGHT OF.
HUSBAND AND WIFE, 2.
LEASE.

DEMAND.

See CONVERSION.

DEVISE.

A devise of all the testator's "lands, tenements, hereditaments and real estate situate in the manor of R." &c., together with "the appurtenances, rents, issues and profits thereof," is sufficient to transfer to the devisee rents due upon leases in fee. *Main v. Green*, 448

DIVORCE.

See HUSBAND AND WIFE, 1.

DOWER.

1. The limitation of twenty years, prescribed by the revised statutes, for actions to recover dower, is applicable to cases where the husband died, and the wife's title accrued, previous to the passage of the revised statutes. *PECKHAM, J. dissented. Brewster v. Brewster*, 428
2. Where a person having a vested remainder in fee in real estate, subject to a life estate therein by another, dies before the tenant for life, leaving the latter seised of such life estate, his remainder in fee never having vested in him in possession, he is not seised, either in deed or in law, and his widow is not entitled to dower, either at common law or by statute. *Durando v. Durando*, 529

E

EASEMENT.

See BURIAL, RIGHT OF.

EJECTMENT.

1. After forfeiture and condition broken, a mortgagee, if he be in possession, is considered as having the legal estate, and an action of ejectment cannot be maintained against him. *Bolton v. Brewster*, 889
2. If rent is due upon a lease in fee, ejectment will lie for its non-payment, against a tenant occupying

only a portion of the land; who cannot object that the recovery is not for the whole tract embraced in the lease, or for land not in his possession. *Main v. Green*, 448

See LEASE.
RENT.

ESTOPPEL.

In 1835 L. and G. entered into an agreement in writing, by which L. undertook to fill in with earth, &c., certain lands under water, owned by G., and as a compensation for the labor, G. covenanted to convey to L. one-third part of such lands, in fee. L. proceeded to fill in the lots, having previously made a survey of the same, in which he was aided by T., the then owner of the adjoining lots on the south. On such survey T. placed stakes, and made a monument, to indicate the boundary line between him and L., and L. filled in the lots to correspond with the stakes and monument. T. was repeatedly upon the ground, while the work was in progress, and made no objection thereto. *Held*, that the line between the two adjoining owners being thus established, and located by the acts and acquiescence of the parties themselves, and L. having expended money and labor in making valuable and permanent improvements upon the lots, in the faith and confidence that the line so marked was the true line, it must be regarded as such; and that persons claiming title under T. were estopped from controverting the line as thus established and located. *Laverly v. Moore*, 347

See CONVERSION.
PAYMENT, 2.

EVIDENCE.

1. Under the general denial in an answer, authorized by the code, evidence of a distinct affirmative defense is not admissible. The only evidence which the defendant is entitled to give, in such a case, is limited to a contradiction of the plaintiff's proof, and to the disproof of the case

made by him. *Beatty v. Swarthout*, 298

2. Hence, where, in an action for an unlawful taking and conversion of property, the defendant, under a general denial in his answer, offered to prove that he took the property as sheriff, under and by virtue of an execution, by and with the consent of the plaintiff, who drove the property to the place of sale, and actually bid on it at the sale; *Held* that this evidence, not being offered for the purpose of disproving the taking, but to justify the taking by showing a license, was not admissible. *ib*

3. Where a party is in possession of property, claiming it as his own and proves a sale thereof to him by the former owner, sufficient as between them, to pass the title, this is sufficient proof of property to entitle him to recover against a wrongdoer, for taking and converting it. *ib*

4. And if, in such an action, the defendant justifies the taking, as sheriff, by virtue of an execution, he will not be allowed to show that the sale of the property to the plaintiff was fraudulent, without prior proof of a lawful execution. *ib*

See DEATH BY WRONGFUL ACT, &c. 7, 8.

PAYMENT.

RAIL ROAD COMPANIES, 23, 24, 25.

SLANDER, 3, 4.

EXAMINATION OF PARTIES.

See WITNESS.

EXCEPTIONS.

The denial of a motion to amend an answer is not the subject of an exception, which only lies to some ruling or decision upon, and in the progress of, the trial. *Woodruff v. Hurson*, 557

EXECUTION.

1. A judgment and execution must describe the party whose property

is sought to be taken; and it is not enough that the right man is made to pay the debt. *Farnham v. Hildreth*, 277

2. The sheriff can only execute the process against the person or property of the individual named. *ib*

Property exempt from.

3. Prima facie, all the personal property of a judgment debtor is liable to levy and sale upon execution. If he would claim exemption for any of such property, he must bring himself and his property within the exceptions of some statute, by proper proof. *Dains v. Prosser*, 290

4. A wagon is not exempt, at law, as such, from levy and sale on execution. But when customarily used in connection with a horse or horses, and harness, it may constitute a part of a team, and will come within the meaning of the word team as used in the statutes of exemption, and not be liable to be sold upon execution. *ib*

5. The decision to the contrary, in *Morse v. Keyes*, (6 How. Pr. Rep. 18,) overruled. *ib*

6. But where a party claims the exemption of a wagon, as being a part of a team, he is bound to show, affirmatively, that the team is worth, as a whole, less than \$250, or does not exceed in value that sum. *ib*

7. If there is no proof to show what the value of the team was, as an entirety, or what was the value of the several parts, or of any part thereof, except the wagon, the exemption cannot be allowed. *ib*

Proceedings supplementary to.

8. Proceedings supplementary to execution cannot be had upon an execution issued by a county clerk, on a justice's judgment for less than \$25, of which a transcript has been filed in the county clerk's office. *Anonymous*, 201

See EVIDENCE, 2.

EXECUTORS.

1. A court of equity has jurisdiction over foreign executors, where they are sued, not for any liability of their testator, or his estate, but on their own liability for the wrongful use or misapplication of the trust funds which have come to their hands. *Montalvan v. Clover*, 190
2. Hence, where it appears that all the debts of the deceased have been paid, and that the executors have a large sum of money in hand belonging to the estate, which they are using in their joint commercial enterprises, and that the estate is in jeopardy, the court will, on the application of a legatee, order the executors to invest his share of the estate at interest, in the manner directed by the will. *ib*

See MORTGAGE.

EXEMPT PROPERTY.

See EXECUTION, 8 to 7.

F

FALSE REPRESENTATIONS.

See MALICIOUS PROSECUTION.

FERRIES.

1. Title to property is always held upon the implied condition that it must be surrendered to the government, either in whole or in part, when the public necessities, evidenced according to the established forms of law, demand. *The People v. Mayor &c. of New York*, 102
2. In regard to *ferries* there is a still further right which the public may exercise, to wit: the right of regulating the rates of ferrage, and of so controlling ferry franchises and privileges in the hands of grantees or lessees, that they shall not be abused to the serious detriment or inconvenience of the public. The grantees of ferries, or ferry rights, must be

deemed to accept the grants subject to these implied conditions. *ib*

3. The act of May 14, 1845, to establish and regulate ferries between the city of New York and Long Island, was by operation of law, repealed by the amended charter of New York, granted in 1857. *ib*

See NEW YORK, CITY OF, 5 to 14.

FORECLOSURE SUIT.

Where a bill of foreclosure stated that a portion of the mortgaged premises had been released from the operation of the mortgage, by the mortgagee, and that the mortgage was not a lien thereon; and the decree excepted that portion from the effect of the decree of foreclosure; but the master's deed, through inadvertence, embraced the whole mortgaged premises; it was *held*, that the premises released did not pass to the purchaser at the master's sale, and that the deed had no effect whatever upon the title of the true owner of the premises released. *Lavery v. Moore*, 847

See MORTGAGE.

FOREIGN EXECUTORS.

See EXECUTORS.

FRAUD.

See ARREST.
VENDOR AND PURCHASER, 5.

H

HIGHWAYS.

The law having said that the justice before whom proceedings for the reassessment of damages occasioned by the laying out of a highway are instituted, shall consummate them, the mandate must be obeyed; and the absence of such justice, so that he cannot be found, or induced to certify the verdict of the jury, in the

form required by the statute, will not authorize another justice to certify the verdict. *The People, ex rel. Lefever v. Board of Supervisors of Ulster County*, 478

See CERTIORARI.

HIRING AND SERVICE.

See AGREEMENT.
WORK AND LABOR.

HUSBAND AND WIFE.

1. Where a husband, by his complaint, demands judgment against his wife for a separation from bed and board for ever, without asking for any other relief, or for relief generally, if it appears from the facts stated in the complaint that the plaintiff is not entitled to a judgment for separation from bed and board, he cannot, upon a demurrer to the complaint for insufficiency, have a decree declaring the marriage contract void; notwithstanding the complaint contains allegations which, if proved, would have authorized such a decree upon a proper prayer. *Walton v. Walton*, 203
2. At common law, a deed of lands, from a married woman to her husband, is void, and passes no title; and the act of April 11th, 1849, "for the more effectual protection of the rights of married women," does not remove the common law disability of the wife, so far as to authorize her to convey her lands directly to her husband. *CAMPBELL, J. dissented. White v. Wager*, 250

I

INCUMBRANCE.

See VENDOR AND PURCHASER, 1.

INDORSER.

See AGREEMENT.
PRINCIPAL AND AGENT, 1 to 7.

INFANTS.

Upon an application by infants for an order directing the sale of their real estate, it is not necessary that a next friend should be appointed, to present the petition. The court may grant the order upon a petition presented in behalf of the infants by their mother, as their natural guardian. *Matter of Whillock*, 48

INJUNCTION.

1. An injunction will not be granted in behalf of the legally elected trustees of a religious society, to restrain individuals, having no right to the office, from assuming to act as such. The remedy in such a case is by a suit in the nature of a *quo warranto*. *Hartt v. Harvey*, 55
2. Although it is not usual, nor proper, as a general rule, to inquire into the right of the court to grant relief, upon an application for an injunction, yet inasmuch as the code requires, as a prerequisite to an injunction, that it shall appear by the complaint that the plaintiff is entitled to the relief demanded, the court will, on a motion to continue a temporary injunction, examine the question as to its power to grant the relief demanded, in the case. 3b
3. Where there is a clear violation of law, or a clear misuser or abuse of its corporate powers, on the part of a municipal corporation, it is an appropriate ground for an injunction. *The People v. Mayor &c. of New York*, 102
4. Where an act threatened to be done is one of serious consequence to the public, such as the execution of leases for ferry privileges, for a term of years, which leases, if made, will confer rights of property, and the fact of their having been actually granted might present embarrassment in the way of their being subsequently set aside, the preventive remedy by injunction may be resorted to. 3b
5. The people, as representing the general public—the body of citizens

who are aggrieved — are the proper parties to enforce such remedy. *ib*

See BURIAL, RIGHT OF.

MUNICIPAL CORPORATIONS, 1, 2, 3.
NEW YORK, CITY OF, 10, 11, 12.

INSURANCE.

1. A policy of insurance against fire, issued by a mutual insurance company, is not void because it is, by its terms, to extend beyond the time limited by the charter of the company, for its corporate existence. *Huntley v. Merrill*, 626

2. An insurance made by a mutual insurance company created by the laws of this state, upon property situated in the state of Pennsylvania, when the contract is made by the company itself, at its office here, is not void as being in violation of the laws of Pennsylvania. *ib*

3. A mutual insurance company may effect insurances upon property in Pennsylvania, without the intervention of an agent located there, provided the contract be made by the company itself, at its office here. And in such a case the proviso in the statute of Pennsylvania, passed in 1849, requiring every agent of a foreign insurance company to file in the office of the secretary of state a duplicate copy of his appointment, has no application. *ib*

INTERMENT.

See BURIAL, RIGHT OF.

J

JUDGMENT.

1. A judgment rendered by a justice of the peace, upon the filing of a transcript and the docketing thereof in the county clerk's office, becomes a judgment of the county court; and under section 71 of the code, no action will lie thereon without the leave of that court, first obtained. *Lyon v. Manly*, 51

2. A judgment and execution against *Freeman Hildreth* will not authorize a sale of the property of *Truman Hildreth*, although the latter may be the individual intended. *Farnham v. Hildreth*, 277

3. The judgment and execution must describe the party whose property is sought to be taken, and it is not enough that the right man is made to pay a debt. *ib*

4. After final judgment, dismissing a complaint, has been duly rendered and entered, which judgment is precisely what it was intended to be, and disposes of the whole case, the court will not, in the absence of any allegation, or pretense of mistake or omission, amend such judgment, on *motion*, upon considerations not presented at the hearing, in order to give to the plaintiff relief not then contemplated. *New York Ice Company v. North Western Ins. Co.* 584

5. B., the owner of land, contracted with M. to convey the same to him, on being paid the sum of \$160, and M. went into possession, under the contract. The contract was subsequently assigned by B. to C. to secure the payment of an antecedent debt; *Held* that after the execution of the contract B. was, in equity, the trustee of the legal title for M., and M. the trustee of B. as to the unpaid purchase money. That this relation continued until B. assigned the contract to C.; after which time M. was the trustee of C. as to such unpaid purchase money; and B.'s position was that of a mere naked trustee of the legal title, with no right or interest in the land, on which a lien by judgment could attach. *Towsley v. McDonald*, 605

6. *Held*, also, that C. had a right to take an assignment of the contract, in payment or as security for an antecedent debt due from B.; and that such debt was a sufficient consideration to constitute him a *bona fide* purchaser, as against the claims of other creditors of B. *ib*

7. After judgment has been obtained against a defendant, upon a substituted service, made under a judge's order, and supplementary proceedings have been commenced against

the defendant, and proceeded with, without any objection being made by the defendant to the validity of the judgment; he appearing upon such proceedings, with his counsel; he cannot move to vacate the judgment on the ground that jurisdiction of his person had not been acquired, and that consequently the judgment was void. *Collins v. Ryan*, 647

See APPEAL, 2 to 7.
JUSTICES' COURTS, 1.
PRACTICE.

JURISDICTION.

The supreme court has no power, in an action upon a draft or bill of exchange, to order the draft to be annexed to a commission issued to take the examination of witnesses for the defendant, residing in another state. *Butler v. Lee*, 75

See EXECUTORS.
JUDGMENT, 7.
PRACTICE, 9.
RELIGIOUS SOCIETIES, 4.

JUSTICES' COURTS.

1. Where, in an action in a justice's court, on a judgment recovered before a justice of the peace, which the complaint stated had been docketed in the county clerk's office, the answer insisted that the plaintiff could not maintain an action upon the judgment, for the reason that, "under the provisions of the code no action can be maintained on a judgment of the county court;" it was held that the objection that leave of the county court, to bring the action, had not been given, was substantially presented by the answer. *Lyon v. Manly*, 51

2. Where towns corner together, although they do not touch each other at any other point except the corners, they are to be deemed *adjoining* towns, within the meaning of the statute authorizing actions to be brought before a justice of the peace of another town, in the same county, "next adjoining" the residence of the plaintiff or defendant.

(2 R. S. 226, § 8, sub. 8.) BALLOON, J. dissented. *Holmes v. Carley*, 440

3. Where, upon the joining of issue, in a justice's court, the defendant moves for an adjournment, to which the plaintiff objects, and demands that the defendant be first required to make oath and give bail, which the defendant refuses to do, it is erroneous for the justice to grant the adjournment, upon such motion, without oath or bail. *Peck v. Andrews*, 445

4. Although a justice has the power, in his discretion, to adjourn a cause not exceeding eight days, upon his own motion, with or without the consent of parties, yet where it appears that he did not exercise such discretion, but granted an adjournment, upon the application of the defendant, without requiring him to make oath or give bail, such adjournment will be deemed an irregularity. 45

5. The effect of an irregular and unauthorized adjournment is that the cause is out of court, and the justice loses jurisdiction. 45

6. A party will not waive his objection to an irregular adjournment, by renewing his old subpoena. 45

JUSTICES OF SUPREME COURT.

Salary, in first district.

See CONSTITUTIONAL LAW, 1.

L

LANDLORD AND TENANT.

1. In a proceeding before a justice of a district court, in the city of New York, by a landlord against his tenant, under the statute relative to summary proceedings to recover the possession of land, the justice has no power to summon talesmen, to form a jury. *Miner v. Bunting*, 540

2. The proceeding is entirely statutory, and must be conducted in strict accordance with the provisions of the law. 45

LEASE.

1. Notwithstanding the act of April 14, 1860, which declares that the acts of 1805, of 1813 and of 1830, conferring upon grantees of demised lands and rents and the reversion thereof, and upon the heirs and assignees of the lessor and grantees, the remedies by entry, action or otherwise, for the non-performance of any agreement, or the recovery of any rent, and extending the benefits of these provisions to grants or leases in fee reserving rents, &c. "shall not apply to deeds of conveyance in fee, made before the 9th day of April, 1806, nor to such deeds hereafter to be made," an action of ejectment, for the non-payment of rent, may be brought by the assignee of the devisee of the grantor, upon a lease made previous to 1806, where the plaintiff had acquired the rights and remedies of the original lessor previous to the act of 1860. *Main v. Green*, 448
2. The legislature did not intend, by the act of 1860, to take away rights already vested or acquired, under the previous statutes; especially those, to enforce which suits had been already brought. *ib*
3. It seems, the act of 1860 is to be limited to cases of rights acquired, or attempted to be acquired, under conveyances prior to 1806 and since 1860, by means of assignments or transfers made or executed since the passage of the act of 1860. *ib*
4. Although a mere right of entry is not assignable, so as to authorize an action by the assignee, in his own name, yet where a party, while the acts of 1805, 1813 and 1830 were still in force, and before the act of 1860 was passed, acquired by assignment the rights and remedies of the original lessor, for non-payment of rent and breach of conditions; *Held*, that such assignee was authorized by section 11 of the code, to maintain ejectment in his own name. *ib*
5. Rents reserved in a lease in fee are apportionable among the several tenants occupying the demised premises, *it seems*. *ib*

6. If rent is due upon such a lease ejectment will lie for its non-payment, against a tenant occupying only a portion of the land; who cannot object that the recovery is not for the whole tract embraced in the lease, or for land not in his possession. *ib*
7. The assignee of the original lessee is to be deemed the *owner* of the land and liable for the rent, notwithstanding he has given a mortgage upon the premises. Hence he is the proper person upon whom service of the notice is to be made, by the lessor or his assignee, under the act of May 18, 1846. *ib*
8. Proof of payment of rent, upon a lease in fee, by the immediate grantor of the occupant, sufficiently establishes the existence and validity of the instrument, as against the tenant in possession; especially when taken in connection with the giving of a mortgage upon the demised premises, by the latter to his grantor, which secures the repayment of any rent the mortgagee may pay to the original lessor. *Van Rensselaer v. Secor*, 469
9. Such mortgage is proper evidence, in an action against the mortgagor for rent, as proof of his claim and title to the premises; of his derivative title under his immediate grantor; as some evidence of the quantity of land; and as evidence of the recognition of the plaintiff's title and rent. *ib*
10. Where it is shown that the defendant is in possession of the demised premises; that he took title from one who was in under the plaintiff; and that he has mortgaged the land in an instrument which recognized the original lessor's rent, this is sufficient proof of his being the assignee of the lessee. *ib*

See RENT.

LIEN.

See VENDOR AND PURCHASER, 2, 3.

LIMITATIONS, STATUTE OF.

1. The meaning of the 78d section of the code, in declaring that the title

relative to the time of commencing actions should not extend to actions already commenced, or to "cases where the *right of action* had already accrued," was to except from the operation of the section (110) requiring the new promise or acknowledgment to be in writing, only those cases where an action had been already commenced, or should be thereafter commenced, upon a then existing and effective cause of action, which should, of itself, and without the aid of any subsequent promise or acknowledgment, be sufficient to support the action. *Van Allen v. Feltz*, 189

2. It is the new promise or acknowledgment, which gives vitality to the cause of action, and it forms the substance of the right of action prosecuted. *ib*
3. Hence, when a promise or acknowledgment, made before the statute of limitations had run, but since the code took effect, is relied on as taking the case out of the statute of limitations, it must be in writing. *ib*
4. The limitation of 20 years, prescribed by the revised statutes for actions to recover dower, is applicable to cases where the husband died and the wife's title accrued previous to the passage of the revised statutes. *PACKHAM, J. dissented. Brewster v. Brewster*, 428

See ALIEN.

LUNATICS.

1. The appointment of a stranger to be committee of the person and estate of a lunatic, without the request of the relatives and next of kin of the lunatic, without an order of reference, and without notice to the persons having a prospective interest in the estate, is not authorized by the practice of the courts. *Matter of Lamores*, 122
2. If the next of kin of a lunatic unite in a petition, and name a proper person as committee, or give their consent in writing to the appointment of a particular person, it is usual to select such person. But if the next

of kin have not assented, or united in the petition, there should be an order of reference, and then the next of kin are entitled to notice of the proceedings upon the reference, and to propose themselves as the committee. *ib*

M

MALICIOUS PROSECUTION.

1. The law will not authorize or justify a complaint against a debtor, and his arrest by the creditor, on the ground of false representations made by the accused on obtaining goods from the prosecutor, when positive evidence of the truth of such representations was furnished, or referred to, by the accused, at the time of making the representations, and it was the creditor's own fault that he did not avail himself of such evidence. *Grinnell v. Stewart*, 544
2. Thus, where G. on applying to S. for goods, on credit, represented that he was worth \$20,000 over and above his debts and liabilities, and that his property consisted of certain specified real estate, and he referred to the records in Queens county clerk's office for the evidence of his ownership, which representations were true, and his ownership did appear by the records in such clerk's office; *Held* that these facts showed a want of probable cause for instituting criminal proceedings by S. against G. for obtaining the goods by fraudulent representations; notwithstanding it appeared that S. on a search made by him in the clerk's office, with the aid of the clerk, before instituting the criminal proceedings, had failed to discover the evidence of G.'s title. *ib*
3. *Held, also*, that, in an action by G. for malicious prosecution, there being sufficient proof of a want of probable cause, malice might be inferred; and that whether or not the criminal prosecution was malicious should have been submitted to the jury. *ib*

MANDAMUS.

1. The proceedings by mandamus are not affected by the code, but must

be regulated by the rules of pleading and practice prevailing previous to its adoption. *People ex rel. Leffer v. Board of Supervisors of Ulster county*, 478

2. The return to the writ must set forth the title or justification of the defendant for not doing the act, the performance of which is sought to be enforced by the writ. *ib*
3. It should state all the material steps taken by the defendant, just as they occurred; and should, in itself or by express adoption of the allegations in the writ, either in whole or in part, state the case which makes out the defendant's justification. *ib*
4. Such return may set up any number of facts, constituting as many good reasons for not performing the act which the writ seeks to compel; provided they exist in point of fact. *ib*
5. The argument *ab inconvenienti* is never of very great weight; of none against the positive injunction of a statute. *ib*

See MORTGAGE.

MAP.

See DEED, 1, 2.

MASTER'S DEED.

See FORECLOSURE SUIT.

MILITARY OFFICERS.

See NEGLIGENCE, 3, 4.

MISNOMER.

Where a defendant, sued by a wrong name, fails to appear in the action, he does not waive his right to object to the misnomer, after judgment and execution. *Farnham v. Hildreth*, 277

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MORTGAGE.

1. Where the intent of the parties to a mortgage is to provide a security for all the debts of the mortgagor, and not to secure one debt by the mortgage, and then to secure the next debt incurred upon the residue of the mortgage, but rather that all shall stand as if contracted at the same time, the debts must share ratably in the fund realized from the security; without regard to priority of date. *Bridenbecker v. Lowell*, 9
2. In an action brought to foreclose a mortgage containing a clause making the principal due in case of default in paying the interest for a certain number of days, it is not a valid defense, or ground of relief, that the defendants were unable to find the holder of the mortgage, until after the time for paying the interest had passed; where the answer does not allege any trick or fraud on the part of the plaintiff, to prevent the payment of interest. *Dwight v. Webster*, 47
3. The assignee of a junior mortgage, whose assignment is recorded, is entitled to notice, upon the foreclosure by advertisement of a senior mortgage. *Winslow v. McCall*, 241
4. If no notice is served upon him he will not be foreclosed; nor will his rights under his mortgage be affected by the foreclosure and sale. *ib*
5. Where the owner of premises which are subject to a mortgage, while in possession thereof, takes an assignment of the mortgage which is substantially forfeited by the non-payment of the amount due thereon, he will, from the time of such forfeiture, be deemed a mortgagee in possession, and may defend the possession until his debt is paid. *ib*
6. It is not necessary that he should have obtained possession as mortgagee, either by consent of the mortgagor, or by legal proceedings. It is sufficient if he obtained the possession in some legal mode. *ib*
7. After forfeiture and condition broken, the mortgagee, if he be in pos-

session, is considered as having the legal estate, and an action of ejectment cannot be maintained against him. *Bolton v. Brewster*, 389

8. Upon a certificate executed and acknowledged by one of three mortgagees, which describes him as "acting executor of the estate of A. C. deceased," and states that the mortgage therein mentioned has been paid, and consents that the same be discharged of record, the register is not bound to discharge a mortgage given to the person executing the certificate and two others, as executors, where there is nothing to show the facts in respect to the origin of the mortgage, or the purpose for which it was made, or the persons interested therein, or for what purpose it was received or held by the mortgagees, or whether for their own benefit, or as trustees upon an express trust created by the will of their testator, or for any other purpose. *People, ex rel. Son, v. Miner*, 612

9. And the register cannot be compelled, by mandamus, to discharge the mortgage upon such a certificate. *ib*

See DEBTOR AND CREDITOR, 1, 2.
SURPLUS MONIES.
USURY, 1, 2, 3.

MUNICIPAL CORPORATIONS.

1. The attorney general may bring an action in the name of the people, to restrain a municipal corporation from exercising authority, in making a contract, or performing similar acts, not possessed by it under its charter or by law. *The People v. Mayor &c. of New York*, 85
2. The passing of a resolution, by the common council of a municipal corporation, directing one of the departments to give a contract for work and labor to specified persons, is a legislative act, and cannot be restrained by injunction. *ib*
3. But after such a resolution has been passed, on a proper case being shown for relief, an injunction may

issue to prevent the resolution from being carried into effect. *ib*

4. In an action brought in the name of the people, for the purpose of obtaining such an injunction, on the ground that by the resolution the common council did not give the contract to the lowest bidders, as required by law, neither the contractors nor the bidders need be made parties. *ib*
5. A property owner cannot invoke the equitable interposition of the supreme court for any omissions or irregularities in the proceedings of a municipal corporation to open a street. *Kelsey v. King*, 410
6. He may review them by certiorari; or he may put in issue the title of the public authorities of the city to enter upon his lands, by a common law action, which will bring up the regularity of the proceedings to open the street; but he cannot test their effect upon his title by an equitable action. *ib*
7. Nor is he entitled to an injunction, to restrain the construction of a sewer, by persons contracting with the corporation, on the ground of a defect in the form, or in the parties to, the contract. *ib*
8. Where the powers conferred upon a municipal corporation, in respect to streets and side-walks, are specified in its charter, and such powers are merely *discretionary*; no absolute and imperative duty to repair the side-walks being imposed upon the corporation; such corporation is not liable in damages to an individual, for injuries sustained in consequence of the defective condition of a side-walk. *Peck v. Village of Batavia*, 634
9. Before an action will lie, at the suit of an individual sustaining peculiar damages, against a municipal corporation, for an omission to perform a duty enjoined by law, it must be shown that the duty has been imposed *absolutely and imperatively*, and does not rest in *discretion*. *ib*

See INJUNCTION, 3, 4, 5.
SEWERS.

MUTUAL INSURANCE COMPANIES.

See INSURANCE.

N.

NEGLIGENCE.

1. Negligence, whether of the plaintiff, or the defendant, is, in all instances, a question of fact, and it is only where a question of fact is entirely free from doubt that the court has a right to apply the law without the action of the jury. *GOULD, J. dissented. Bernhardt v. Rensselaer and Saratoga Rail Road Co.,* 165
2. And more especially should that question be submitted to the jury, where some of the matters relied upon to make out negligence depend upon contradictory testimony. *ib*
3. What degree of care and caution are required from a military officer, while drilling his troops, in order to avoid the infliction of injuries upon individuals present as spectators. *Castle v. Duryea,* 480
4. And how far such officer is liable for an injury resulting from the negligence of himself or his subordinates, under such circumstances. *ib*

See CARRIER.

DEATH BY WRONGFUL ACT, &c.
RAIL ROAD COMPANIES, 8 to 26.

NEW YORK, CITY OF.

1. The clause of the 88th section of the act of April 14, 1857, amending the charter of the city of New York, which provides that whenever any work is necessary to be done to complete or perfect a particular job, &c. for the corporation, which shall involve the expenditure of more than \$250, the same shall be by contract, &c. does not include work forming part of a job which, in a contract for the residue of the job, appears to have been intentionally excluded, to be let in future, or to be otherwise done. *People v. Mayor &c. of New York,* 35
2. The proper construction of the first section of the act in relation to frauds in assessments for local improvements in the city of New York, passed in 1858, which provides that if, in the proceedings relative to any assessment for the purpose mentioned, or in the proceedings to collect the same, any fraud or legal irregularity shall be alleged to have been committed, the party aggrieved may apply to any judge of the supreme court for relief, &c., is that the words "proceedings relative to any assessment," therein mentioned, are not to be extended beyond the initiatory steps to order the doing of the work for which the assessment is to be made. The changing of the grade in streets is not necessarily a proceeding relative to an assessment for paving. *Matter of Buhler,* 79
3. Accordingly held that the section did not apply to the case of an assessment regularly made for paving a street, which assessment was rendered necessary in consequence of an ordinance of the common council, passed subsequently to the opening of the street, changing the grade of the street, and thus requiring the grades of the adjoining streets to be altered, to correspond therewith. *ib*
4. The want of the written consent of two thirds of the owners of property to a change of the grade of a street as required by the act of 1852 is not a sufficient cause, within the provisions of the act of 1858, for vacating an assessment made for paving streets after the new grade was adopted. *ib*
5. A lease of a ferry, executed by the corporation of the city of New York, which requires twenty per cent of the annual rent to be paid at the time of the sale of the privilege; that security be given only for the remainder; that there be a bid equal to the present aggregate amount of the rent of the ferries, as a condition of purchase; that the lessees shall keep, on each ferry-boat, a fire apparatus or force pump, with hose, to be used for the extinguishment of fires, under the direction of the chief engineer, for which the lessees are to be compensated at the rate of twenty dollars per hour, is not, by reason of

- those provisions, a violation of the 41st section of the amended charter of 1857. (*Lanes of 1857, ch. 446.*) *The People v. Mayor &c. of New York*, 102
6. A sale or lease of the five ferries between the cities of New York and Brooklyn, together, the purchaser being required also to purchase the entire ferry property attached to all the ferries, is not a violation of the act of 1857, either in letter or spirit. There is nothing which forbids a sale in that form, or requires a sale of the ferries, or of the ferry property, separately; and the mode of sale is left to be governed by a sound discretion. *ib*
7. When the New York and Brooklyn ferries or ferry rights were conveyed to the Mayor, Recorder, Aldermen and Commonalty of New York, by the colonial governors, Dongan, Cornbury and Montgomerie, the grantees took the same subject to this governmental regulation and control. On the change of government from a colony to a state, this right passed to the supreme power in the state; and it may now be manifested and exercised by the legislature acting for the people in their sovereign capacity. *ib*
8. And although the corporation of New York should execute to a grantee a lease of those ferries, unqualified in its terms, and silent as to the prices which should be charged for ferriage, except in respect to the maximum rate specified in the notice of sale, those rates would still be subject to legislative supervision and control, and the lessees would take the same subject to such qualification. *Per HOGGBOOM, J. ib*
9. While the regulation of the rates of ferriage upon the New York and Brooklyn ferries is within the control of the legislature, and, so long as those rates are not regulated by them, they are the proper subject of regulation, by the city government, or of contract between the corporation and its lessees, it is a very different question whether, and to what extent, it ought to be interfered with by the courts. *Per HOGGBOOM, J. ib*
10. Where a regulation fixing the maximum rate of ferriage, for foot passengers, at two cents, is alleged to be an abuse of corporate power, if the matter is so plain that it will amount to fraud, or palpable oppression upon the citizens who shall have occasion to cross the ferry, it seems a court of equity should interfere. *Per HOGGBOOM, J. ib*
11. But it seems that a mere difference of opinion between the court and a municipal corporation, as to the proper rate of ferriage to be charged, ought not to induce an interference by injunction; especially where the erroneous judgment of the corporation, if it exists, may be corrected by an appeal to the legislature. Such a power, if it exists in the courts, ought to be most cautiously exercised. *ib*
12. The corporation of New York is by its charter, taken in connection with its subsequent action under the same, vested with the property of certain ferries, and with the right to establish others. Incident to that right, in the absence of legislative action, must be the right to establish rates of ferriage. *ib*
13. And the matter being left to the discretion of the corporation, it may exercise such discretion by passing resolutions fixing the maximum rates of ferriage, as effectively as by the passage of a local law, for that purpose. *ib*
14. The act of May 14, 1845, to establish and regulate ferries between the city of New York and Long Island, was by operation of law, repealed by the amended charter of New York, granted in 1857. *ib*
- See CONSTITUTIONAL LAW, 1.
FERRIES.
MUNICIPAL CORPORATIONS, 1 to 4.
- NOTICE.
- L. entered into possession of lots, under an agreement in writing between him and G., by which it was stipulated that L. should fill in the same and other lots owned by G., and that in consideration thereof G.

should, on the completion of the work, convey to L. one-third of the lands, in fee. L. caused his agreement with G. to be recorded in the county clerk's office, and continued in possession until after the completion of the work. *Held*, that although the agreement was not a conveyance, within the meaning of the recording act, yet that it tended to show the character of L.'s possession; that such possession, under claim of title to a deed from G., was notice to subsequent mortgagees and others, of his interest and claim; and that the lien of a subsequent mortgage given by G. was subject to L.'s right to a deed, under his contract. *Lacey v. Moore*, 847.

See PARTNERSHIP, 5, 6.

P

PARTIES.

See REFERENCES.

Examination of. See WITNESS, 3, 4, 5.

PARTNERSHIP.

1. The mere insolvency of a special partnership does not, of itself, work such a legal or equitable appropriation or distribution of its effects to, or among, all its creditors ratably, as to deprive a particular judgment creditor of his right to issue an execution, and to seize, and sell, and make his debt out of those effects; or to prevent any individual creditor who has no judgment, from commencing an action in his own name and right alone, and obtaining a judgment for his debt. *Greene v. Brock*, 78

2. Nor will such insolvency deprive a judgment creditor of his right, by action, to remove a fraudulent obstruction, and enforce the payment of his judgment, in the absence of any action or proceeding on the part of other creditors, for a pro rata distribution or application. 5b

3. It is well settled that each member of a partnership, after dissolution, has the same right and authority to collect, compound and release the debts of the firm, existing at the time of such dissolution, that he had before. *Huntington v. Potter*, 800

4. As the law gives to any debtor of a partnership the right to settle with either member of the firm and take a release, after dissolution, it will not impute bad faith to such debtor, in making such settlement, from the fact that he had knowledge of the dissolution. 5b

5. Notice of the dissolution, merely, is not enough to put the debtor upon inquiry in respect to a previous assignment of his debt by his creditors. 5b

6. Where a debtor of a partnership, after dissolution of the firm and with notice thereof, settles with one of the partners and takes a discharge, valid in law as between them, without any notice of a previous assignment of the debt against him, to a third person, by the partnership, the discharge is conclusive upon the assignee. 5b

7. The ordinary effect of the death of one of the members of a partnership is, to work its dissolution. The partnership is ended. The connection has been dissolved; and the future relations of the surviving partners to each other must be determined by some new agreement between them, or by the results which the law pronounces upon their acts and proceedings, when no new agreement is in fact made. And so of a change in the concern, effected by a transfer of stock. *Savage v. Putnam*, 420

8. Where articles of copartnership provide that parties may transfer their stock—in effect that new members may be introduced into the firm, and existing members may withdraw—the object of which provision is to continue the partnership, and prevent its dissolution; the effect is to make the new stockholder a member of the firm, with all the ordinary rights and liabilities of a partner, entitled to all the property,

profits and dividends represented by his shares of stock, and subject, to the same extent, to all the debts, liabilities and losses of the concern. He takes the stock *cum onere*. In 1847 two of the plaintiffs, B. and W., together with other persons, entered into a partnership or company, for lumbering purposes, with a capital of \$10,000. They subscribed certain articles of association specifying the officers and directors of the association and the mode of carrying on its business. The 12th article provided for a transfer of the stock owned by any member, and in effect authorized such transfer to any third person, on notice to the directors. The articles did not declare what should be the effect of such a transfer, nor whether the out-going member should remain liable, or the in-coming member should become liable for the then existing debts of the copartnership, as between the members themselves; nor what should be the effect of the death of any of the members upon the existence or terms of the partnership. Prior to July, 1849, various changes had occurred in the membership of the association, by transfers of stock between members, and to new parties, and W. P., one of the original shareholders, had died. All of the present plaintiffs, and the defendants P. and V. had become members of the association. At this time a new agreement, in writing, was entered into, subscribed by the parties to this action, recognizing the existence of the association, reciting what lands belonged to it, and who were the holders of the shares, and declaring that said lands were owned by them in proportion to the amount of their shares of stock, and pledging their respective interests in the property and effects of the association to the payment of all the existing *and future* debts of the association, and promising to pay such indebtedness in proportion to the amount of their stock. The agreement further provided that the subscribers should not be liable for any debts contracted after they had sold out their stock and left the association &c. On or prior to October 25th, 1853, P. and V. sold out their stock, and ceased to be members of the concern. Various loans had

previously been made, and debts incurred, to carry on the business of the association. Subsequent to that time, the plaintiffs, with the funds of the association, paid several of its debts contracted while P. and V. were stockholders. This suit was brought to enforce a contribution by P. and V. to those debts. P. claimed to be allowed, as a counter-claim, the sum of \$306.46 which he had been compelled to pay, upon a debt of the association incurred during his membership. *Held*, 1. That under the original articles of association P. and V., though liable to the creditors of the copartnership, for any indebtedness existing during their membership, were not primarily liable, equally with the plaintiffs, but were merely sureties for the plaintiffs as their principals, and were therefore not liable in this action. 2. That the plaintiffs were not aided by the new agreement of July, 1849. 3. That P. having been compelled, as surety for the plaintiffs, to pay a debt owing by the copartnership, was entitled to his remedy over against his principals; and that his counter-claim was therefore properly allowed. *53*

PAYMENT.

1. *What amounts to.*

1. The giving of a promissory note, by a debtor, without any additional security, does not pay or satisfy the original debt. Although it is a payment *sub modo*, yet the creditor may always sue and recover upon the original consideration, on producing and cancelling the note at the trial. *Central City Bank v. Dana*, 296
2. H. & H. borrowed of the plaintiff two sums of \$1000 and \$1750 and gave their joint notes, indorsed by the defendants, to secure the payment of the amount. These notes being unpaid at maturity, and protested for non-payment, the plaintiff, at the request of the defendants, discounted the note of the latter for \$2750, and the proceeds were used in taking up the previous notes for \$1000 and \$1750, which latter notes were then surrendered to the defendants and cancelled, and the

names of the makers and indorsers erased. The \$2750 note being protested for non-payment, at maturity, was sued upon by the plaintiff, and the action being defended by the indorsers, on the ground of usury, judgment was given for the defendants. The plaintiff then brought this action, upon the \$1000 and \$1750 notes. *Held*, that the defendants, having by their defense in the former suit, asserted and declared the \$2750 note to be void for usury, and having elected to annul and disaffirm it, for that reason, it ceased thereafter to be available to them for any purpose; and that they were estopped from setting up that note as a valid payment of the \$1000 and \$1750 notes, in this action. *cb*

8. *Held*, also, that the record and proceedings in the former suit were properly admitted, to show that the defendants had disaffirmed the \$2750 note and had insisted on its invalidity. *cb*

2. Appropriation of.

4. Where the intent of the parties to a mortgage is to provide a security for all the debts of the mortgagor, and not to secure one debt by the mortgage, and then to secure the next debt incurred upon the residue of the mortgage, but rather that all shall stand as if contracted at the same time, the debts must share ratably in the fund realized from the security; without regard to priority of date. *Bridenbecker v. Lowell*, 9
5. Where money is received by a bank upon the foreclosure of a mortgage given to secure to the bank the payment of all paper then held, or thereafter to be held, by it, upon which the mortgagor should be liable as maker, indorser or acceptor, the cashier has no right, without authority from the directors of the bank, or the knowledge or assent of the mortgagor or his indorsers, to appropriate such money, or any part thereof, to the payment of notes of the mortgagor, indorsed by such cashier, to the exclusion of other notes of the mortgagor, held by the bank. *cb*
6. In such a case, the indorsers of other notes of the mortgagor, held by the bank, have a right, legal as well as equitable, to share ratably in the fund and security provided generally for the debts due the bank; and this right cannot be affected, or impaired, by any act of the bank or its officers. *cb*
7. The fact that money received by a cashier, as such, upon a sale of mortgaged premises, for a debt due the bank, has been kept by him nominally separate from the funds of the bank, and that it stands to his individual credit on the books of the bank, will not authorize him to appropriate the same to the payment of a portion of the debts secured by the mortgage, to the exclusion of the rest. *cb*
8. Where the cashier of a bank has been employed by an indorser of paper held by the bank, to look after his interests and see that he shares equally in a security provided for the benefit of all occupying a similar position, and he has undertaken to act in that capacity, it will be a fraud upon his principal if he appropriates the funds in such a manner as to exclude him. *cb*
9. Where a fund, thus raised, is in the possession of a bank, if the law does not appropriate it to the payment of the several debts due the bank, ratably, the debtor not having appropriated it, the creditor, alone, can make the application. *cb*
10. In such a case it is the right of the creditor to make the application of a payment in such manner as he pleases; provided he makes the election within a reasonable time, and the application made is not inequitable. *cb*
11. But it is inequitable, in respect to the debtor, as well as to other sureties, for the creditor to apply the fund in hand to a debt for the payment of which a specific fund has been provided. *cb*

PEWS.

1. A religious corporation, through its trustees, who are by statute invested with the temporalities of the corporation, has the right to regulate the use of the meeting house, to make repairs, alterations and improve-

- ments; and the pew-owners take and hold their privileges in subordination to the rights of the corporation. *Cooper v. First Presbyterian Church of Sandy Hill*, 222
2. A pew-owner has no separate or individual property in the timber or materials of which the house, or any of its parts, is composed, or in the soil below the pew, but his right is that of occupancy of the pew during public worship; and this right of occupancy must yield to circumstances of necessity, convenience and expediency, growing out of the rights in common of the society. *ib*
 3. Although the change in the internal arrangement of a church edifice is merely expedient, or matter of convenience to the society, still the trustees, in behalf of the corporation, may legally direct the alteration, and the pew-owners who shall be deprived of their rights in their pews, must be content with a just and adequate compensation. *ib*
 4. The right of a pew-owner, not being absolute, but qualified by, and subject to, the right of the trustees to alter the internal arrangement of the church as the good of the society may require, no constitutional objection arises when, in the exercise of such right by the trustees, the pew is destroyed from necessity, or for purposes of expediency or convenience. *ib*
 5. Although there is a presumption in favor of the acts of trustees, as agents or officers of the corporation, yet pew-owners will not be *concluded* by the exercise of an arbitrary and despotic will, on the part of the trustees, in determining the question of necessity, expediency and convenience. *ib*
 6. They must carry out the reasonable and legal will and wishes of the corporation. They will be presumed to do this, in regard to repairs, improvements and changes made on the church property, in the absence of any allegation that they are acting against the will and wishes of the body they represent. *ib*
- ### POWER OF ATTORNEY.
1. A power of attorney authorizing the attorney to arbitrate, purchase, sell, dispose of, compromise or otherwise settle, any claim or claims against a vessel, her freight and cargo, for salvage services rendered to such vessel and cargo, will not authorize the attorney, after realizing the salvage claim, to make a disposal of the proceeds among those interested, in such manner and proportion as he sees fit, and to allow such charges against the fund as he pleases. *Hawkins v. Avery*, 561
 2. The authority given by such an instrument is to enable the attorney to deal with the owners or claimants of the vessel and her freight and cargo, and to recover, for the benefit of all, a proper compensation for salvage services. When the fund is received, the agency ceases. *ib*
- ### PRACTICE.
1. A defendant moving for a nonsuit is bound to bring to the notice of the judge the special grounds claimed as justifying it. A motion, general in its terms, will not present the objection that the action should have been *case* for negligence, instead of *trespass* for a direct injury. *Castle v. Duryea*, 480
 2. Formal objections should not be listened to by the judge, on a motion for a nonsuit, unless distinctly made. *ib*
 3. Requisites of the affidavit on which an order for the publication of a summons is applied for. *Townley v. McDonald*, 604
 4. The affidavit must not only show the existence of a cause of action, and that the defendant cannot, after due effort and diligence, be found within the state, but it must further appear, when the application is under subdivision 2 of section 135 of the code, that being a resident of the state, the defendant has departed therefrom with intent to defraud his creditors or to avoid the service of a summons, or keeps himself concealed therein with the like intent. *ib*

5. To establish an intent to defraud creditors, the affidavit must show that the defendant has property, of some kind, and that he has made or is about to make, a fraudulent or illegal disposition of it; or that he unjustly refuses to apply it to the payment of his debts; or has secreted or removed, or is about to secrete or remove it; or has fraudulently incumbered it. 5b
 6. To authorize an order for publication on the ground of a departure from the state, by the defendant, with intent to avoid the service of a summons, the affidavit must furnish proof of such intent. 5b
 7. Where it did not appear, from the affidavit, that any summons was out against the defendant, when he left the state; or that any was about to be issued against him; or that he was threatened with, or feared, or expected a suit; and there was nothing stated therein from which it could be seen or fairly inferred that he had any intent either to defraud creditors, or to avoid the service of a summons; *Held* that the affidavit was defective, and an order for publication, founded thereon, unauthorized and void. 5b
 8. Where an order for the publication of a summons is granted under subdivision 2 of section 135 of the code, which presupposes that the debtor is a resident of the state, but has departed therefrom, or kept himself concealed therein, and it also appears from the affidavit that he is a resident of a particular place in this state, the order must direct service of the summons and complaint to be made upon the defendant by mail. 5b
 9. If an order for the publication of a summons is granted upon an insufficient affidavit, and does not direct service of the summons and complaint to be made by mail, in a proper case for such a service, the court acquires no jurisdiction of the case, and a judgment entered there-in is void. 5b
 10. The act authorizing substituted service of subpoena and complaint to be made in certain cases, under an order of the court, where personal service cannot be made, (*Laws of 1853, p. 974.*) requires that the judge who makes the order shall be *satisfied* that the defendant sought to be served resides in this state and cannot be served, for the reasons stated, before he can act in the matter; and *being satisfied*, he may make the order. *Collins v. Ryan*, 647
 11. Such judge is, consequently, authorized and required to decide whether or not sufficient facts are shown to confer jurisdiction; and if he decides affirmatively, that question becomes *res judicata*. 5b
 12. An order for affirmance, by default, founded upon a notice of argument addressed to and served upon the attorney of a defendant, after the death of the latter, and after the attorney for the appellant has been notified of his death, is irregular. *Warren v. Eddy*, 664
 13. If the personal representative of the deceased defendant is a non-resident, so that the action cannot be revived in his name, the proper course of the plaintiff, if he desires to prosecute the appeal, after receiving notice of the death of the defendant, and that his administrator intends to abandon the appeal, is, to have an administrator appointed here, and then apply to have the action revived in the name of the latter. 5b
- See EXCEPTIONS.*
REFERENCES, 1, 2.
- PRINCIPAL AND AGENT.**
1. Where a bank places notes, of which it is the holder, in the hands of an indorser, to be used by him in obtaining an indemnity from the maker, it thereby consents to be bound by the indorser's acts, and to that extent constitutes him its agent; notwithstanding the indorser, in making use of the notes, acts on his own behalf, and for his own indemnity. *Bridenbecker v. Lowell*, 9
 2. The agents of a bank, occupying a confidential relation towards it, can-

- not act as such in matters in which they have a personal interest. *ib*
8. Where the cashier of a bank has been employed by an indorser of paper held by the bank, to look after his interests and see that he shares equally in a security provided for the benefit of all occupying a similar position, and he has undertaken to act in that capacity, it will be a fraud upon his principal if he appropriates the funds in such a manner as to exclude him. *ib*
4. In the absence of evidence that a cashier of a bank was restricted in his authority, it will be assumed that a transmission of promissory notes held by the bank, to an indorser, to enable the latter to obtain an indemnity from the maker, was within the scope of his authority. *ib*
5. It is not necessary that the indorser should be constituted the agent of the bank by formal letter of attorney. It is sufficient that he is put in possession of the notes, with apparent authority in respect to them, to make him the agent of the holder. *ib*
6. Under such circumstances, as between the maker of the notes and the bank, the latter is bound by the acts of the indorser, in respect to the notes placed in his hands, as well by reason of the authority necessarily and expressly conferred, in view of the purpose for which the notes were sent, as by reason of the apparent authority with which the agent was clothed, and upon the faith of which the maker had a right to act. *ib*
7. Where a bank, for the purpose of enabling an indorser of notes held by the bank, to obtain payment or security from the maker, transmitted the notes to the indorser, who thereupon made an arrangement with the maker, by which property was transferred to the indorser for the payment of the notes, and the latter were surrendered up to the maker, to be canceled; and the bank, on being informed of what had been done, accepted a part of the fruits of the arrangement, without objection, and had never repudiated the transaction, or reclaimed the notes; *it was held* that the bank had, by such subsequent acts and acquiescence, ratified the acts of the agent. *ib*
8. In such a case, if the principal does not intend to abide by the acts of his agent, he should dissent, and give notice within a reasonable time. If he fails to do so, an assent to, or ratification of, the acts of the agent will be presumed. *ib*
9. Although the conveyance of the property is made to the agent, directly, and not to the bank, yet by the transfer a trust is created, for the payment of a debt due to the bank; and the fund thus provided belongs to the bank, and may be controlled by it. But the debt is not discharged, as between the bank and the maker of the notes. A specific fund is dedicated and set apart by the debtor, and received by the creditor, for the payment of the debt; and if, upon a sale of the property, it proves insufficient to satisfy the debt, the debtor will be personally liable for the deficiency. *ib*
10. If a person authorizes another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority; and he may bind his principal, within the limits of the authority with which he has been apparently clothed, with respect to the subject matter. *Per ALLEN, J.* *ib*
11. A general agency is therefore constituted, not by the authority which the agent actually receives, from his principal, but by that which the latter allows the agent to assume. *Per ALLEN, J.* *ib*
12. What will amount to proof of an implied authority in a clerk in a mercantile house to sign shipping bills in the names of his principals. *Dows v. Greene,* 490
- See AGREEMENT.*
- PROCEEDINGS SUPPLEMENTARY
TO EXECUTION.
- See EXECUTION, 8.*

PRODUCTION OF BOOKS, &c.

See WITNESS, 3, 4, 5.

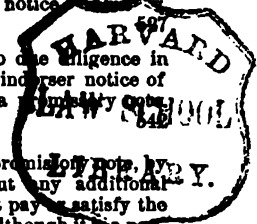
PROMISSORY NOTES.

1. Where an indorser, on being informed by the holder, previous to the maturity of the note, of his intention to notify him, the last day of grace, in the afternoon, to make him holden, unless he, the indorser, would say it was "all right;" said "the note is perfectly good; put yourself to no trouble; it is all right." *Held*, that this was sufficient evidence of a waiver of demand and notice of non-payment, to go to a jury; and that a nonsuit was improperly granted. *Russell v. Cronkhite*, 282
2. Where a note, made by McQ. and indorsed by the defendant for the sole benefit and accommodation of the maker, to enable him to take up a previous note also indorsed by the defendant, was diverted from the purpose for which it was made and indorsed, without the knowledge or consent of the indorser, and transferred to the plaintiffs as security for a precedent debt, the plaintiffs at the same time surrendering to McQ. a security held by them amply sufficient to pay the amount of their previous debt against McQ.; *Held* that this surrender constituted the plaintiffs bona fide holders of the note, for value, and that they were entitled to recover the amount, of the indorser, notwithstanding the diversion. *Ayrault v. McQueen*, 806
3. Two negotiable promissory notes, for \$500 each, made by P., were indorsed by C. for his accommodation, to be used to take up an equal amount of other paper previously made by P. and also indorsed by C. for P.'s accommodation. The notes were dishonored, at maturity, and a suit being brought thereon, against all the parties, by the Rochester City Bank, the then holder thereof, the plaintiff, at the request of P. and for his benefit solely, paid to the attorney of the bank the whole amount of the notes, and thereupon received the notes from the attorney,

with an assurance from the latter that he, the attorney, had authority from the bank to make the transfer. *Held*, that the plaintiff obtained a valid title to the notes by the purchase and transfer from the attorney of the bank, and could maintain an action thereon, against C. *Warner v. Chappell*, 809

4. *Held also*, that under the circumstances it would be presumed that the authority to the attorney to transfer the notes was contained in a proper resolution of the board of directors of the bank, for that purpose duly passed. 35
5. *Held further*, that if there were an omission on the part of the directors of the bank to pass the requisite resolution to authorize the transfer, yet that the plaintiff, being a purchaser for the full value of the notes, and having paid the price, in cash, without notice of such omission, his title to the notes would be protected by the last clause of the 8th section of the title of the revised statutes which makes void all transfers of the property and effects of a moneyed corporation, exceeding \$1000, unless authorized by a resolution of the board of directors. 35
6. Where a party takes, from the holder thereof, the note of a third person, payable to the order of, and indorsed by, an insurance company, paying value therefor, he has a right to presume that the note was transferred in pursuance of a resolution of the board of directors; and is therefore a bona fide holder for value, without notice. *Blanchard*, 807
7. What amounts to due diligence in serving upon an indorser notice of the dishonor of a promissory note. *Libby v. Adams*, 842
8. The giving of a promissory note, by a debtor, without any additional security, does not pay or satisfy the original debt. Although it is a payment *sub modo*, yet the creditor may always sue and recover upon the original consideration, on producing and cancelling the note at the trial. *Central City Bank v. Dana*, 296

See AGREEMENT, 2.



R

RAIL ROAD COMPANIES.

1. *Their rights, under their charters.*
 1. A rail road company being authorized, by grant from the legislature, to construct and operate a rail road through the streets of a city, and the common council of the city having given its assent to the construction of the road by the company, upon the route designated in its charter, on certain conditions; *Held*, that the common council had no power, by resolution, to annul or impair the grant to the company on account of its failure to complete the road within the time limited by the conditions annexed to the assent of the common council. *SCRUGHAM, J. dissented. Brooklyn Central Rail Road Co. v. Brooklyn City Rail Road Co.,* 358
 2. *Held, also*, that the condition to complete the road within a given time, was a condition subsequent; the franchise vesting in the grantee subject to be defeated by its omission to perform the condition. That the omission did not *ipso facto* determine the estate, but exposed it to be determined at the election of the grantor. But that nothing short of a judicial decision upon the question could deprive the grantee of the franchise, or impair its rights of property therein. *ib*
 3. When a rail road has been laid down in a public street of a city, in pursuance of a grant from the legislature and the assent of the municipal authorities, it does not become a part of the street, so as to authorize the public at large, and other rail road corporations, with the consent of the common council, to use the road with the appropriate cars or carriages for the transit of passengers, in common with the owners of the franchise. *ib*
 4. Any rule which would recognize the right of the public, and such other corporation as the municipal authorities might choose to license, to the indiscriminate use of a railway constructed in a public street, on the ground that it was a part of the
2. *Who are stockholders; their liability.*
 5. There are two modes in which a person may become a stockholder in a rail road company, incorporated under the general rail road act, viz: by subscribing the articles of association and becoming a member of the corporation, as provided in sections 1 and 2, of the statute; or by subscribing to the capital stock, in the book opened by the directors, after the corporation is in existence. *Erie and New York City Rail Road Co. v. Owen,* 616
 6. No one who has only signed articles of association before the corporation came into being, is a corporator, or a member of the corporation, unless the articles so signed by him have been filed in the office of the secretary of state, as required by the statute. *ib*
 7. Where duplicate sets of articles are used for the purpose of obtaining subscriptions, and one set, signed by several persons, and accompanied by the proper affidavit, is filed in the office of the secretary of state, while the other set, subscribed by different individuals, is not so filed, the subscribers to the latter paper do not become members of the corporation, and are not liable upon their subscriptions. *ib*
3. *Duty and liability as carriers of passengers.*
 8. The fact that a passenger upon a rail road is standing upon the platform of a car when he receives an injury by means of a collision of cars occasioned by the negligence of the rail road company or its agents, will not, of itself, independent of the provisions of the general rail road act of 1850, bar his recovery of damages for the injury sustained. *Wills v. Long Island Rail Road Co.,* 398
 9. The 46th section of the general rail road act applies to a case where, although the casualty resulted from serious neglect of their duty by the

public easement, would be destructive of the entire system of city rail roads. *Per BROWN, J.* *ib*

- rail road company, yet it proved dangerous or injurious only to those who were exposed by being upon the platform of the car in violation of the printed regulations of the company. *ib*
10. The "proper accommodation" which, by that section, rail road companies are required to furnish to passengers, implies not only space enough, within the cars, to contain the passengers, but also the means of sitting, in the usual manner, during the journey. *ib*
11. A rail road company, to entitle itself to the protection of the statute, in case of injury to a passenger while upon the platform, is bound to show that it furnished not only room in the cars, but *seats*. If there are no vacant seats, a passenger is not chargeable with fault, nor exposed to the statute, for remaining on the platform. *ib*
12. The fact that there are no vacant seats in the car which a passenger enters, will not justify him in going upon the platform, provided there are accommodations in the other cars of the train, and there is sufficient time and opportunity for the passenger to go where there are seats, before the train starts. *ib*
13. But a passenger is not bound to go from one car to another, in search of a seat, after the train has started. *ib*
14. Neither is a passenger bound to require a person occupying an entire seat to make room for him, nor to displace him so as to obtain a seat, though the seat be large enough for two persons to occupy when sitting properly. *ib*
15. Nor is it the duty of a passenger, with reference to the requirements of the general rail road act, to require persons to displace articles which they have placed upon a seat, in order that he may be seated. *ib*
16. Rail road companies are bound to furnish the accommodations mentioned in the statute—the room and the seats—and not merely to furnish passengers with the means of obtaining them. *ib*
17. They have a right to make regulations as to the use of the seats, and the power to enforce them, and it is the duty of their servants and agents to provide seats for passengers, without waiting for any application from the latter. *ib*
18. A rail road company is bound to exercise great care and caution in carrying passengers through the streets of a city. *Clark v. Eighth Avenue Rail Road Co.*, 657
19. In an action by a passenger, to recover damages for an injury sustained by him by means of a collision, the negligence of the plaintiff, in order to defeat the action, must have contributed to the injury or the accident. *ib*
20. A passenger's occupancy of the platform of the car, if it be by the permission of the carriers or their servants, and if accompanied by active efforts on the part of the passenger to get in a safe position, and to avoid being hurt after he sees danger approaching, will not render him guilty of negligence. *ib*
21. The statutory provision that a person injured while standing on the platform of a car cannot sustain an action for the injury, provided a notice is posted *inside* of the car, forbidding passengers to take such a position, and there is room inside of the car, will not prevent a recovery by a passenger injured while standing on the platform, where the only notice not to occupy the platform is posted *outside* of the car, and is not shown to have come to his knowledge, and the car is full, inside. *ib*
22. In what cases it is proper to submit the question of the plaintiff's negligence to the jury; and when it is the duty of the judge to direct a nonsuit. *ib*
4. *Liability for injuries to property.*
23. In an action against a rail road company for negligence in running over and killing a horse, where the injury is alleged to have occurred in consequence of a defect in a fence which the defendant was bound to maintain, if there is *any* evidence that the fence was insufficient and

defective, and that the defendant's agents knew or had notice of it, and that the horse got upon the track by means of such defect, it is erroneous to nonsuit the plaintiff. *Morrison v. New York and New Haven Rail Road Co.*, 568

24. If, in such a case, there is any evidence that the horse got upon the rail road track over or through a fence which the defendant was bound to maintain, it should be submitted to the jury; but not so of evidence that possibly the horse so got upon the track. *ib*

25. If there is no evidence that the horse got upon the track in the manner alleged, the plaintiff should be nonsuited. *ib*

*See BROOKLYN CITY RAIL ROAD CO.
DEATH BY WRONGFUL ACT, &C.
NEGLECTANCE.*

RECOUNPMENT.

See AGREEMENT.

REFEREES.

1. A defendant, on a trial before a referee, cannot urge, as an objection to proceeding to trial, that other persons who are necessary parties defendants have not been served with process. *Hawkins v. Avery*, 551
2. That objection relates solely to the regularity of the reference, and makes no part of the trial, and is not therefore the subject of an exception. *ib*
3. If the action is not in readiness for trial it is not referable; and the objection should be taken on the motion to refer. *ib*
4. Such an objection is, in substance, for the want of parties; and that objection must be taken by answer or demurrer. *ib*

*See AMENDMENT, 1, 2.
CERTIORARI.*

RELEASE.

See WILL.

RELIGIOUS SOCIETIES.

1. The question as to the qualifications of voters, at an election for trustees of a religious society, arises for decision when the voter offers his vote. If the vote is not challenged, it must be received; if it is challenged, the inspectors must determine the question of qualification. Having received the vote, the inspectors have decided the question, and they cannot afterwards disregard the vote on the ground that it was illegal. *Hartt v. Harvey*, 55
2. Where the certificate of the inspectors stated that at the election a majority of the votes were cast for one set of persons as trustees, and that the inspectors, as such, declared the apparent result, at the time, but that very soon thereafter satisfactory evidence was produced before them, proving that a part of the votes cast for that set of persons were illegal, and the inspectors then proceeded to certify that another set of persons had a plurality and a majority of the legal votes cast, and were duly elected trustees of the society; *it was held* that the act of the inspectors, in rejecting a part of the votes as illegal, after the same had been received and deposited in the box, was unauthorized; that the certificate showed no right to the office, in the persons to whom it was given; and that the first mentioned set of persons were to be deemed duly elected. *ib*
3. Where a certificate of inspectors confines itself to a bare declaration that the persons to whom it is given are elected, it is *prima facie* evidence of the right of such persons to the office; but where it recites the facts upon which the inspectors rely as their justification and authority for declaring those persons elected, and those facts clearly show that the persons named were not elected, the certificate destroys itself. *ib*
4. A court of equity refuses to entertain jurisdiction over corporate

elections, because the questions involved are legal ones, and are properly triable in a court of law; and this although a question of fraud in the election be involved. *ib*

See INJUNCTION.
PEWS.

RENT.

1. Where in covenant for rent due upon a lease in fee, against two persons as joint occupants of the premises, there is proof of a joint occupancy by them, and of an acknowledgment by both that they occupied under the lease, this is sufficient prima facie evidence that they held as assignees. *Main v. Davis*, 461
2. The assignee of a part of the premises embraced in a lease in fee, is liable for his proportionate part of the rent reserved, where the evidence does not show who the other owners of the demised premises, if any, are, and there is reason to conclude that the portion of the premises occupied by the defendants devolved upon them by operation of law. *ib*
3. The utmost effect of the act of April 14, 1860, (*Laws of 1860, ch. 896*), is to limit the application of the act of 1805 to deeds executed between 1805 and 1860. It was not the intention of the legislature that the act of 1860 should apply to rights acquired and vested before its passage; especially where suits to enforce those rights had been commenced previous to the passage of that act. *ib*
4. Independent of the act of 1805 or its subsequent re-enactments, the assignee of the grantor in a lease in fee may, under the provision of the code of procedure abolishing the distinction between legal and equitable remedies and requiring all actions to be brought in the name of the real party in interest, maintain an action against an assignee of the lessee for the recovery of rent. *ib*

See LEASE.

REPLEVIN.

See CONSIGNOR AND CONSIGNEE.

S

SALVAGE.

Where the saving vessel is put at risk it is right that its owners should receive a portion of the salvage proportionate to the risk. But where one of the salvors is the owner of a boat which is used only as a means to enable the salvors to reach the derelict vessel, he is fully compensated by receiving the value of his boat. He is not entitled to a share of the net salvage, as the owner of such boat. *Hawkins v. Avery*, 551

SEWERS.

1. Under the 8th section of the act of April 15, 1857, in relation to sewerage and drainage in the city of Brooklyn, and the acts amending the same, which declares that should the commissioners, in devising a system of drainage for the entire city, "find it necessary to construct a sewer through any street or avenue not opened by law, and such sewer cannot be constructed so as properly to drain any portion of the city, without carrying the same through such unopened street, or avenue," it shall then be lawful for the commissioners to apply to the supreme court, and institute the usual proceedings to open the street, the commissioners are to exercise their own discretion as to the sewers, and the location of them, which are to constitute an efficient system of sewerage for the city. *Kelsey v. King*, 410
2. The words used in that section do not indicate an intention, on the part of the legislature, that the unopened streets shall not be appropriated to the uses of the sewerage system unless it is physically impossible to conduct the sewerage through the streets already opened to public use; so as to make an absolute necessity the condition upon which the commissioners can apply to open a street. *ib*

3. The appropriation of land to the uses of a public street, in a city, in conformity with the statutes and the constitution, confers the right to appropriate it to the uses of constructing a sewer devoted to conducting away the impurities and surplus waters collected from portions of the city, without compensation to the owner. cb
4. The two uses of land for a street and for a sewer are not inconsistent and different; the use for a sewer being incidental to, and within, the use for a public street; and both contributing to benefit the adjoining property. cb
5. There is a distinction between an appropriation of land to a rail road company, for the use of its road, and an appropriation thereof for the uses of a public sewer, in a city; the former being for the exclusive profit of the stockholders in the company, and the latter, for the benefit of the public at large; and a rail road being an impediment and an obstruction above, and upon the surface of the street, of the most serious and dangerous character; while a sewer lies below the surface of the street, forms no obstruction, makes no noise, and creates no danger. *Per Brown, J.* cb
6. When a sewer has been constructed, through a street already opened to the public, it takes nothing away from the owner of the adjoining land. He suffers no detriment, and no injury, and should the law provide a mode of awarding him compensation, it would be a nugatory provision; for he parts with nothing of value. *Per Brown, J.* cb
7. The right to construct the necessary sewers, in the public streets of a city, to remove and conduct away the impurities which collect therein, to the prejudice and peril of life and health, as well as from the adjoining lots, must from necessity, exist as a right incident to the use of a street. cb

See MUNICIPAL CORPORATIONS.

SHERIFF.

- A sheriff can only execute process against the person or property of

the individual named therein. *Turnham v. Hildreth,* 277

See COMPLAINT, 2, 3.

SHERIFF'S SALE.

1. No mere purchaser at a sheriff's sale can, before completing his purchase and taking title, maintain an action in relation to the premises sold, against any person not a party to the suit in which the judgment of sale was rendered. *Blanco v. Foote,* 535
2. A party becoming the inchoate purchaser of premises, at a sheriff's sale, under a judgment of foreclosure, by making the highest bid, paying ten per cent of the sum bid, and signing a memorandum of purchase, will not acquire such a right to, or interest in, the premises as will entitle him to maintain an action against judgment creditors of a former owner, who were not parties to the foreclosure suit, for the foreclosure of their lien upon the premises by virtue of their judgment. cb
3. Neither will such purchaser, even after he has completed his purchase by paying the whole of the purchase money and taking his deed, be entitled to a judgment against such judgment creditors, foreclosing their lien under their judgment. cb
4. *It seems* the only relief to which the purchaser is entitled, in such a case, against the judgment creditors, is that they redeem the premises from his purchase within a specified time or be foreclosed; or a judgment declaring that their alleged judgment was not a lien on the premises, but only a cloud on the purchaser's title thereto. cb

SIDE-WALKS.

See MUNICIPAL CORPORATIONS, 3.

SLANDER.

1. In an action for slander, the innuendo cannot enlarge the meaning of the

words spoken beyond the averment of the intention by which the speaking of the words is introduced, where the words themselves are ambiguous, and do not necessarily impute crime. *Weed v. Bibbbs*, 815

2. Where a complaint, in an action for slander, alleged that the plaintiff was the widow of E. W., deceased, who died leaving considerable property, real and personal, which he bequeathed to the plaintiff and his infant son; that after her husband's death the plaintiff was delivered of a male child, who was the son of E. W., and his only heir and next of kin; that after the birth of such child, the defendant, intending to injure the plaintiff, &c., and to cause it to be believed that she, the plaintiff, had produced a false and pretended child and heir of E. W., charged her with having got a "bogus baby;"—"a bogus baby to get W.'s property;" styling it "another Cunningham affair—another bogus baby—a sham to get W.'s property," &c.; thereby charging and intending, and meaning to charge the plaintiff with having been guilty of the crime of fraudulently producing an infant, and falsely pretending it to have been born of parents whose child would be entitled to a share of personal estate, and to inherit real estate, with the intention of intercepting the inheritance of such real estate, and the distribution of such personal property from the persons lawfully entitled thereto; *Held* that although the words spoken did not necessarily impute a crime, yet, when looked at and understood in the light of the introductory averment, and the innuendo, a criminal offense was clearly imputed to the plaintiff, by the defendant. 3b

3. *Held also*, that evidence showing what was generally understood by "the Cunningham affair" was improperly admitted. That the question of the meaning of the language employed, and of the intention of the defendant in using it, was a question for the jury, upon the whole case, and not a matter to be established by the opinion or understanding of any witness, or number of witnesses. 3b

4. *Held further*, that under an answer properly setting up the defense, in mitigation of damages, the defendant had a right to prove that at, and before, and after the time when, according to the natural laws, the said child was begotten, the physical state and condition of the plaintiff's husband, was so prostrated, feeble and infirm as to deny to him the physical power and ability to beget a child. 3b

SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER, 14.

STATUTES.

Rights acquired under a statute which is, in its nature, a contract, and which does not reserve to the legislature the power of repeal, cannot be divested by subsequent legislation. *Brooklyn Central Rail Road Co. v. Brooklyn City Rail Road Co.*, 858

See CONSTITUTIONAL LAW.

LEASE, 1 to 4.

NEW YORK, CITY OF, 1, 2, 8, 14.

STREAMS.

1. Individuals owning the bed of a stream, and each bank thereof, have the right to build a dam and embankment, and raise the water of the stream as high as they please, subject only to the restriction resting upon all, so to enjoy their own property as not to injure that of another person, with the qualifications and limitations incident to that rule of property. *Fitzley v. Clark*, 288
2. And if they, in the exercise of that right, build, with due care, an embankment to prevent the water, when raised by their dam above the natural banks of the stream, from overflowing the lands of adjacent owners, and in consequence of raising their dam, the water finds its way through their own natural soil and below the surface thereof, by filtration, percolation or otherwise,

to the land of an adjacent proprietor, the owners of such dam and embankment are not, in the absence of any unskillfulness, negligence or malice, liable to such adjacent proprietor for any damage he may sustain thereby; the injury being *damnum absque injuria*. *ib*

3. A party is liable for any defect in his artificial erections, which might have been remedied by reasonable care and skill, but not for any defect in the natural banks of a stream. *ib*

4. Where persons have the right to use the waters of a stream, for manufacturing purposes, the right to dam the water and detain it a reasonable time, follows as a necessary incident to the right of user; and they cannot be compelled to make an artificial reservoir for that purpose. *ib*

5. The banks of the stream are theirs, for that purpose; and so long as the water is only nominally detained for this lawful, customary and proper purpose, the adjacent land-owners must submit to the indirect and consequential damages resulting to their lands from such use. *ib*

SUBPENA

See JUDGMENT, 7.
PRACTICE, 10, 11.

SUMMARY PROCEEDINGS.

See LANDLORD AND TENANT.

SUMMONS.

See PRACTICE, 8 to 9.

SUPPLEMENTARY PROCEEDINGS.

See EXECUTION, 8

SURPLUS MONEYS.

A subsequent incumbrancer has no claim upon the surplus moneys arising

from a sale under a statute foreclosure of which he has no notice; his lien not being affected by the proceedings. The land, therefore, will not be discharged from the lien of his incumbrance and transferred to such surplus moneys. *Winslow v. McCall*, 241

SURROGATE.

1. A surrogate cannot take cognizance of disputed claims against an estate, and adjudicate upon their validity or invalidity, but must refer them to the common law tribunals, for adjudication, before he can make a decree for their payment. *Curtis v. Stilwell*, 354

2. Where a creditor has obtained a judgment against his debtor, in the supreme court, and upon an appeal to the general term, an order denying a motion to set aside the judgment is subsequently made, and from that order an appeal is taken, by the executor of the defendant, after the death of the latter, to the court of appeals; the surrogate cannot, while such appeal is still pending and undetermined, entertain jurisdiction for the purpose of enforcing the payment of the judgment. *ib*

3. His proper course is to adjourn over the proceedings before him, and suspend the accounting and distribution during the pendency of the litigation in the court of appeals. *ib*

4. Where the record of proceedings before a surrogate, for the proof of a will, shows that the testator, at and immediately before his death, was an inhabitant of the county where the will is proved; that all the necessary parties were properly brought into the surrogate's court, and the witnesses duly examined and their testimony recorded; and that in the execution and publication of the instrument all the requisites of the statute of wills have been duly complied with; *it seems* the jurisdictional fact of residence will be presumed to have been determined by the surrogate; and that the proceedings before him cannot be attacked and subverted, collaterally,

by proof that the testator in fact resided in a different county, at the time of his death; for the purpose of destroying the title to real property devised under the will. *Bolton v. Brewster*, 389

5. *It seems* the court will be reluctant to recognize it as a rule of evidence that the residence or habitation of a testator is open to litigation and controversy, long after his will has been proved and admitted to record, and valuable rights have been acquired under it. *ib*

T

TAXES AND TAXATION.

See CONSTITUTIONAL LAW, 2, 3, 4.

TENDER.

See VENDOR AND PURCHASER, 6.

TITLE TO PROPERTY.

Title to property is always held upon the implied condition that it must be surrendered to the government, either in whole or in part, when the public necessities, evidenced according to the established forms of law, demand. *The People v. Mayor, &c. of New York*, 102

TROVER.

See CONVERSION.

TRUSTEES.

1. Allowances and commissions to, and charges against, trustees on their final accounting. General principles upon which the account is to be taken. *Duffy v. Duntan*, 587
2. Where a trust deed is silent as to the compensation to be paid to the trustees, the law implies an agree-

ment to perform the services for the same allowance which is made by statute to executors and administrators; and the court will allow them that amount. *ib*

3. It is the duty of trustees under an assignment for the benefit of creditors, to keep the trust fund entirely separate and distinct from their own moneys. *ib*

4. If the funds are deposited in a bank they should be deposited to a separate account, and in the names of the trustees as such, to the end that they can at all times be traced and identified. *ib*

5. If trustees mingle the trust funds with their own they commit a breach of trust, and are legally chargeable with simple interest thereon, although they may have made no profit by their use. *ib*

6. In regard to trust property which comes into the hands of the trustees, all that the *cestuis que trust* can claim is, either, 1st. What the trustees may have received for it, upon a fair sale thereof, together with what they may have earned by its use; or 2d. The value of the property at the time it came into their hands. *ib*

7. When the trustees have not derived a profit from the use of property, and the property itself has been lost, by their fault, its value at the time of such loss is the measure of the liability of the trustees. *ib*

8. It is well settled that trustees cannot be permitted to use the trust funds in commercial or other business operations, at the risk of the *cestuis que trust*; and the fact that a share of an item of the trust property belongs to one of several trustees, in his own right, cannot vary the rule. *ib*

9. Rule as to costs, against or in favor of trustees, as between them and the *cestuis que trust*, and as between themselves. *ib*

See JUDGMENT, 5.

U

USURY.

1. Although a mortgagor has parted with the fee of the mortgaged premises, by an assignment of his property in trust for the benefit of creditors, yet he may maintain an action to cancel and set aside the mortgage, on the ground of usury. *Strong v. Strickland*, 284
2. An action of that nature cannot be brought by the assignees of the mortgagor. 26
3. Where a mortgagor makes a general assignment of his property to trustees, in trust for the benefit of creditors, and conveys the mortgaged premises to the assignees upon the same trust declared in the assignment, and as a part of the assigned property; the mortgage debt being placed among the preferred debts provided for and directed to be paid; this will not estop the mortgagor from bringing an action to cancel and set aside the mortgage on the ground of usury. 26
4. To constitute usury, there must be an unlawful or corrupt intent confessed or proved. The party must intentionally take or reserve, directly or indirectly, as interest or as a compensation for giving time of payment, more than at the rate of seven per cent per annum. *Woodruff v. Hurson*, 657
5. Two things must concur: 1. A giving of time; and 2. A reservation of more than seven per cent as a consideration for such forbearance. 26
6. A taking or receiving more than the legal interest, by mistake, or for any consideration other than the forbearance, unless it be merely colorable and with intent to cover up usury, will not render a transaction void as being in violation of the statute regulating the interest of money. 26
7. The giving of a sum of money by the debtor, to the creditor, or the including of an amount in addition to the actual indebtedness in a security given for the real debt, as a

gift, will not bring the security within the statute against usury. 26

8. Although the making of a nominal gift is, in general, a suspicious circumstance, yet when it is clearly established that it is in truth a gift, voluntarily made, having no connection with the time given for the payment of the debt, the security will be valid, whatever may have been the moving cause of the gift, with the donor. 26
9. If the donee or creditor be innocent of any intent to exact or receive more than the legal rate of interest, his security will be valid. 26

V

VENDOR AND PURCHASER.

1. Where a deed of city lots conveys the same subject to a reservation or covenant that five feet of the front thereof shall not be built upon or used, except for steps &c., this is an *incumbrance* on the lots, restricting the owner in the use thereof, and if not excepted, in a contract of sale which stipulates for a title free from incumbrances, nor known to the purchaser when he bought, justifies him in refusing to perform. *Matter of Whillock*, 48
2. The equitable lien of a vendor, for the unpaid purchase money, is raised by the law, in the absence of an express agreement, because it is deemed equitable that the vendee shall not take a perfect, unincumbered title to the property until he pays for it. And the lien is lost, where the parties have waived it; or where it is obvious that they contemplated a different security for the purchase money. *Hart v. Van Deusen*, 92
3. Where the plaintiff, for land sold by him to the defendants, received from them, in part payment, a tract of land subject to a mortgage of \$4000 which the plaintiff assumed to pay, and the defendants covenanted that such tract of land was free from all other incumbrances, but the same was in fact subject to the equitable

- lien of a note for \$900, given to D. the vendor of the defendants, for the purchase money; *Held* that the plaintiff, by taking the *covenant* of the vendees that the lands conveyed by the latter were free from incumbrances, had evinced his intention to rely upon that remedy, for indemnification, and had thereby waived his equitable lien, if any he had, for the unpaid purchase money. And that, at all events, payment or satisfaction, by the plaintiff, of the incumbrance created by the note, or eviction thereunder, was a condition precedent to the enforcement of such an equitable lien. *ib*
4. There must be a substantive cause of action, existing in the plaintiff at the commencement of the suit, and the action cannot rest upon facts subsequently arising. *ib*
 5. Where a vendor asks to have the contract of sale rescinded, on the ground of fraud, it is sufficient for him to produce and cancel upon the trial, the notes given for the purchase money. *Stevens v. Hyde*, 171
 6. If since the purchase, the purchaser has assigned all his property to trustees in trust for the benefit of creditors, and the assignees are in possession of the property, a tender of the money or property received by the vendor, upon the sale, may properly be made to the assignees instead of the purchaser. *ib*
 7. The rule that where property has been taken *tortiously* or *feloniously* no title passes, and the owner is entitled to reclaim the property wherever it can be found, does not apply to a case where the possession has been acquired by purchase and delivery. *ib*
 8. When there is a contract of sale and an actual delivery pursuant to it, a title to the property passes, but the sale is voidable and defeasible, as between vendor and vendee, at the election of the vendor, if obtained by false and fraudulent representations. And the vendor can reclaim his property, as against the vendee, or any person but a bona fide purchaser without notice of the fraud, upon a prompt return of whatever has been paid upon the contract. *ib*
 9. An election by the vendor, to rescind, when distinctly and definitely made, cancels and puts an end to the contract, *in toto*, and restores the vendor to his original title as general owner of the property, and leaves the parties in their original position in respect to the title. *ib*
 10. If nothing has been received by the vendor, towards the purchase money, notice of his election to rescind the contract, with a demand of the property, will entitle him to reclaim it of any person who may have it in his possession. *ib*
 11. If anything has been paid by the purchaser the vendor must restore it, or offer to restore it, before he can claim to have the contract of sale rescinded; and he must keep his tender good. *ib*
 12. A vendor, who wishes to rescind the contract of sale or to hold the purchaser to a performance on the day appointed, should have his deed prepared and executed, ready to be delivered on the payment of the purchase money. *McWilliams v. Long*, 194
 13. When the time for the payment of the purchase money is not an essential ingredient in, or inducement to, the execution of a contract of sale and purchase, the payment or tender may be made within a reasonable time after the day named. *ib*
 14. A purchaser, seeking the aid of a court of equity to enforce a specific performance, must apply promptly. If he slumbers upon his rights for five years after becoming entitled to a conveyance, a specific performance will not be decreed, but he will be left to his remedy, if any he has, by an action for damages. *ib*
 15. In an action to recover the possession of goods alleged to have been obtained fraudulently, the plaintiff may declare generally, claiming the property as his, and give the special facts in evidence, on the trial, to establish the fraud. *Bliss v. Cottle*, 322
 16. Where a purchase of goods is effected by means of fraudulent representations, the sale being upon

credit and the property absolutely delivered, the contract of sale is merely voidable, and passes the title, which remains in the purchaser, until the vendor elects to disaffirm it, as he has the right to do, within a reasonable time after the discovery of the fraud, while the property remains in the hands of the purchaser, or at any time before it has passed to a bonafide purchaser. *ib*

17. The assignee of the fraudulent vendee, under an assignment for the benefit of creditors, stands in the place of his assignor, and has no higher right of property than the latter. *ib*

18. In case of an assignment by the fraudulent vendee, it is sufficient for the vendor to give notice to the assignee, of the fraud and of his claim or election to rescind the contract, and to demand the goods of him. *ib*

19. Where there is no pretense that the assignee was a party to, or cognizant of, the fraud, he is not bound to give up the goods until he has been required to do so by the vendor, upon a distinct demand, with notice of an explicit assertion of his claim that the goods were obtained by fraud. *ib*

20. Such demand must be made by the vendor in person or by some one duly authorized by the vendor to make it. A subsequent ratification, by the vendor, of an unauthorized demand made by a person assuming to act on his behalf, will not be sufficient to avoid the sale, and to entitle the vendor to sue for the conversion of the goods. *ib*

See SHERIFF'S SALE.

W

WAIVER.

See JUSTICES' COURTS, 6.
MISDEMEANOR.
PROMISSORY NOTES, 1.

WARRANTY.

1. A grantee will not be prejudiced in his claim under a covenant of war-

ranty, by a failure to take the actual possession of the premises immediately. He has the right to leave them vacant, if he chooses, and the fact that he might, by taking immediate possession, have prevented a mortgagee from becoming mortgagee in possession until the grantee should resort to legal proceedings, will not affect the right of the latter under the covenant. *Winslow v. McCall*, 241

2. If the right of a mortgagee in possession exists at the time of the conveyance of the premises to a purchaser, in fee, and such mortgagee can, by virtue of that right, now resist the claim of the grantee to the possession, and does in fact resist such claim, the covenant of warranty is broken, and an action can be maintained thereon. *ib*

WATER.

See STREAMS.

WILL.

Construction of, in particular cases.

Barker v. Crosby, 184.
Wilson v. Wilson, 828.

What passes by. See DEVISE.

See SURREGATE.

WITNESS.

1. An attorney, employed by a mortgagee to draw a bond and mortgage, and who acts for him at the execution and delivery of the instruments, not being employed by the mortgagor in the capacity of attorney, counsellor or negotiator in regard to the bond and mortgage, is a competent witness to prove the consideration of the mortgage, and what transpired between the parties, and between himself and the mortgagor, upon the occasion of giving the mortgage; facts thus coming to his knowledge not being privileged communications, within the rule on that subject. *Woodruff v. Hurson*, 557

2. The attorney is a competent witness to prove the negotiation and agreement between the parties; or between the mortgagor and himself as the attorney and agent of the mortgagee. *ib*

3. Under the provisions of the code, a party to an action may not only be examined, at the option of the adverse party, in the same manner as any other witness, but he may also be required and compelled to produce, on such examination, books, papers, &c. which are under his control. *Brett v. Bucknam*, 655

4. The proper mode of proceeding, under an order for the examination of a party, where a production of books &c. is sought, is to continue the examination of the witness until it shall be ascertained whether or not he has under his control any, and if any, what books or papers, admissible as evidence in the action or necessary for the purposes of the examination; and then for the judge to direct what books or papers (if any) shall be produced, and when and where they shall be produced. *ib*

5. A party calling his adversary as a witness has no right to examine any books or papers, or parts of books or papers, which are neither perti-

nent to the issues in the action, nor connected with, or relevant to, the matters in controversy. *ib*

WORK AND LABOR.

1. Where, under a contract of hiring for a specified period, at a fixed salary, the person employed continues to render services beyond that period, he will be entitled to compensation at the same rate, for the additional time. *Vail v. The Jersey Little Falls Manuf. Co.*, 564

2. A continuance in the employment of the hirer, with the consent of the latter, after the expiration of the time specified in the agreement, is equivalent to a new hiring upon the same terms. *ib*

3. The fact that the employer does not continue to carry on his business during a portion of the time, and that during that interval there is nothing for the employee to do, in one of the capacities in which he is employed, will not affect the construction of the contract, or the liabilities of the parties. *ib*

See AGREEMENT.
DAMAGES, 4.

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